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Children's Trust Dated February 11, 1999,
Vegas Group, LLC, and East River Group, LLC*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:
SEARS HOLDING CORPORATION, *et al.*,
Debtors.¹

Chapter 11
Case No. 18-23538 (RDD)
(Jointly Administered)

**IZEK SHOMOF AND ALINE SHOMOF IRREVOCABLE CHILDREN'S TRUST DATED
FEBRUARY 11, 1999, VEGAS GROUP, LLC, AND EAST RIVER GROUP, LLC'S
STATEMENT OF ISSUES TO BE PRESENTED AND DESIGNATION OF ITEMS TO BE
INCLUDED IN THE RECORD ON APPEAL**

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); and Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

Appellant Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC (collectively, "Landlord" or "Appellant"), hereby respectfully submits, pursuant to Rule 8009 of the Federal Rules of Bankruptcy Procedure and Rule 8009-1 of the Local Bankruptcy Rules for the Southern District of New York, this statement of issues to be presented and designation of items to be included in the record on appeal with respect to its appeal of this Court's *Order (I) Authorizing Assumption and Assignment of Lease of Nonresidential Real Property at 2650 East Olympic Boulevard, Los Angeles and (II) Granting Related Relief* (the "Order")² (Dkt. No. 4779) before the United States District Court for the Southern District of New York (the "District Court").

STATEMENT OF ISSUES ON APPEAL

1. Whether the Bankruptcy Court erred in approving the assumption and assignment of Appellant's lease with Debtor Sears, Roebuck and Co. ("Debtor") for store number 1008, located at 2650 East Olympic Boulevard, Los Angeles, California (the "Designated Lease") to Transform Holdco, LLC ("Buyer") or Buyer's assignee under sections 365(a) and 365(f) of the Bankruptcy Code?
2. Whether the Bankruptcy Court erred when it determined that all defaults under the Designated Lease had been cured, or adequate assurance of the cure of such defaults had been provided, under section 365(b)(1) of the Bankruptcy Code in connection with the assumption and assignment of the Designated Lease to Buyer or Buyer's assignee?
3. Whether the Bankruptcy Court erred when it determined that no default existed under the Designated Lease related to Debtor's failure to reimburse Appellant for any amounts Appellant incurred related to the Construction Obligations (as such term is defined in the Order)?

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Order.

4. Whether the Bankruptcy Court erred when it determined that Debtor had no obligation under the Designated Lease to reimburse Appellant from the Construction Estimate Deposit (as such term is defined in the Order) for any work performed by Appellant prior to the assumption and assignment of the Designated Lease?

5. Whether the Bankruptcy Court erred when it determined that no default existed that was required to be cured under the Designated Lease related to the Debtor's failure to cooperate and provide access to the premises subject to the Designated Lease in connection with construction at the Appellant's building?

6. Whether the Bankruptcy Court erred when it determined that the April 1, 2017, deadline to complete the Construction Obligations had not been extended?

7. Whether the Bankruptcy Court erred when it determined that Debtor did not breach the covenant of good faith and fair dealing in the Designated Lease by failing to cooperate with Appellant in the renovation and rehabilitation of Appellant's building?

8. Whether the Bankruptcy court erred when it determined Appellant was not entitled to any cure or compensation related to the \$5,696,046.02 in costs for architects, engineers, consultants, permit fees and contractors, Appellant identified in its supplemental cure objection?

9. Whether the Bankruptcy Court erred when it determined that Buyer or Buyer's assignee had provided Appellant with adequate assurance of future performance of Appellant's lease as required by sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code in connection with the assumption and assignment of Appellant's lease?

10. Whether the Bankruptcy Court erred when it determined that Appellant's lease could not be modified by the course of performance of the parties and other post-lease execution conduct of the parties under applicable California law?

11. Whether the Bankruptcy Court erred when it determined that the Debtor and Appellant were in dispute with regard to the April 1, 2017 deadline?

12. Whether the Bankruptcy Court erred when it determined that Appellant's lease was not modified by the course of performance of the parties and other post-lease execution conduct of the parties under applicable California law?

13. Whether the Bankruptcy Court erred when it determined that under California law the lease could only be modified by a writing signed by the parties?

14. Whether the Bankruptcy Court erred when it found that section 363(m) of the Bankruptcy Code applied to the assumption and assignment of the Designated Lease?

DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL

Landlord designates the following items for inclusion in the record on appeal. Each designated item shall also include any and all exhibits and documents annexed to and referenced within such items.

DOCUMENTS FILED IN BANKRUPTCY COURT

Date	Docket No.	Title of Document
10/15/2018	1	Voluntary Chapter 11 Petition (Sears Holding Corporation)
10/15/2018	4	Motion of Debtors for Entry of Order Directing Joint Administration of Related Chapter 11 Cases
10/16/2018	118	Order Directing Joint Administration of Related Chapter 11 Cases
11/1/2018	429	Debtors' Motion for Approval of Global Bidding Procedures
11/16/2018	776	Order Extending Time to Assume or Reject Unexpired Leases and Subleases of Nonresidential Real Property
11/19/2018	816	Order Approving Global Bidding Procedures and Granting Related Relief
11/21/2018	862	Notice of Filing of Global Bidding Procedures Process Letter
1/18/2019	1730	Notice of Successful Bidder and Sale Hearing

Date	Docket No.	Title of Document
1/18/2019	1731	Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction
1/25/2019	1837	Objection to Cure Amount for Store #1008 Filed by Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC
2/8/2019	2507	Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts, and Leases in Connection Therewith, and (IV) Granting Related Relief
4/2/2019	3008	Order (I) Authorizing Assumption and Assignment of Certain Executory Contracts and Leases and (II) Granting Related Relief
4/12/2019	3171	Notice of Amendment to Asset Purchase Agreement Extending Certain Deadlines
4/19/2019	3298	Notice of Assumption and Assignment of Additional Designatable Leases
5/1/2019	3477	Supplemental Cure Objection and Reservation of Rights (Store #1008) Filed by Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC
5/1/2019	3478	Declaration of Izek Shomof in Support of Supplemental Cure Objection and Reservation of Rights (Store #1008) Filed by Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group, LLC
5/4/2019	3625	Notice of Presentment of Stipulation and Order by and Among Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC and East River Group, LLC Extending Time Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of Lease of Nonresidential Real Property
5/7/2019	3654	Transform Holdco LLC's Omnibus Reply in Support of

Date	Docket No.	Title of Document
		Assumption and Assignment of Designated Leases
5/13/2019	3817	Stipulation and Order by and Among Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC and East River Group, LLC (I) Extending Time Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of Lease of Nonresidential Real Property
5/13/2019	3850	Order (I) Authorizing Assumption and Assignment of Certain Leases and (II) Granting Related Relief
5/29/2019	4066	Notice of Presentment of Stipulation and Order by and Among Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC and East River Group, LLC (I) Extending Time Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of Lease of Nonresidential Real Property and (II) Setting Briefing Schedule
6/11/2019	4186	Stipulation and Order by and Among Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC and East River Group, LLC (I) Extending Time Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of Lease of Nonresidential Real Property and (II) Setting Briefing Schedule
7/9/2019	4489	Transform Holdco LLC's Reply in Support of Assumption and Assignment of Designated Lease for Store Located at 2650 East Olympic Boulevard, Los Angeles, California
7/26/2019	4624	Landlord's Reply to "Transform Holdco LLC's Reply in Support of Assumption and Assignment of Designated Lease for Store Located at 2650 East Olympic Boulevard, Los Angeles, California"
7/26/2019	4625	Declaration of Izek Shomof in Support of Landlord's Reply to "Transform Holdco LLC's Reply in Support of Assumption and Assignment of Designated Lease for Store Located at 2650 East Olympic Boulevard, Los Angeles, California"

Date	Docket No.	Title of Document
8/1/2019	4677	Notice of Agenda of Matters Scheduled for Hearing on August 2, 2019 at 10:00 a.m.
N/A	N/A	Transcript of Hearing Held on August 2, 2019 at 10:00 a.m. (ET), attached hereto as Exhibit A in accordance with Rule 8009-1(a) of the Local Bankruptcy Rules for the Southern District of New York
8/7/2019	4779	Order (I) Authorizing Assumption and Assignment of Lease of Nonresidential Real Property at 2650 East Olympic Boulevard, Los Angeles, and (II) Granting Related Relief
8/20/2019	4916	Notice of Appeal

JOINT EXHIBITS ("JX") FROM THE AUGUST 2, 2019 HEARING

JX No.	Document
1	Amended and Restated Building Lease by and Between 10309 Folsom Blvd., LP and Sears, Roebuck and Co. [Dkt. No. 3477, Ex. A]
2	Amendment to Amended and Restated Building Lease by and Between Izek Shomof and Aline Shomof Irrevocable Children's Trust Dated February 11, 1999, Vegas Group, LLC, and East River Group LLC and Sears, Roebuck and Co. [Dkt. No. 1837, Ex. C]
3	Letter to Steven Velkei, Counsel to Sears, Roebuck and Co., from Jonathan Shomof [Dkt. No. 4489, Ex. B; Dkt. No. 4625-5, Ex. 22]
4	Invoice from East River Group LLC to Sears Holdings Management Corporation [Dkt. No. 4625-1, Ex. 2]
5	Check from Sears Holdings Corporation; 2017 Form 1099; Invoices from East River Group LLC to Sears Holdings Management Corporation [Dkt. No. 4625-1, Ex. 3]
6	Invoice from East River Group LLC to Sears Holdings Management Corporation [Dkt. No. 4625-1, Ex. 4]
7	Invoice from East River Group LLC to Sears Holdings Management Corporation [Dkt. No. 4625-1, Ex. 6]
8	Invoice from East River Group LLC to Sears Holdings Management Corporation

JX No.	Document
	[Dkt. No. 4625-3, Ex. 7]
9	Invoice from East River Group LLC to Sears Holdings Management Corporation [Dkt. No. 4625-3, Ex. 9]
10	Invoice from East River Group LLC to Sears Holdings Management Corporation [Dkt. No. 1837, Ex. D; Dkt. No. 4625-4, Ex. 17]
11	Email Chain with Subject Line "Sears Store time line" [Dkt. No. 4625-5, Ex. 24]
12	Letter from David S. Kupetz to Weil, Gotshal & Manges [Dkt. No. 4625-5, Ex. 25]
13	Request for Modification of Building Ordinances by East River Group, LLC [Dkt. No. 4625-5, Ex. 27]
14	Los Angeles Mail Order District Promotional Brochure [Dkt. No. 4625-6, Ex. 28]
15	Invoice from East River Group LLC to Sears Holdings [Dkt. No. 1837, Ex. A]
16	Invoice from East River Group LLC to Sears Holdings Management Corporation; Annual Secured Property Tax Bill [Dkt. No. 1837, Ex. B]

LANDLORD EXHIBITS ("LL") FROM THE AUGUST 2, 2019 HEARING

LL No.	Document
1	Spreadsheet entitled "Reimbursement Request" [Dkt. No. 4625-1, Ex. 1]
2	Invoices from East River Group LLC to Sears Holdings Management Corporation; Invoices from Vendors to East River Group LLC; Checks from East River Group LLC; Gmail Receipts from Valley Concrete Coring [Dkt. No. 4625-2, Ex. 5]
3	Invoices from East River Group LLC to Sears Holdings Management Corporation; Invoices from Vendors to East River Group LLC; Checks from East River Group LLC [Dkt. No. 4625-3, Ex. 8]
4	Invoices from East River Group LLC to Sears Holdings Management Corporation; Invoices from Vendors to East River Group LLC; Checks from East River Group LLC [Dkt. No. 4625-3, Ex. 10]
5	Email Chain Between Leo Pustilnikov, Dolores Guarnaccia, Others Re: "Sears Retail AC installation" [Dkt. No. 4625-4, Ex. 11]

LL No.	Document
6	Email Chains Between Jonathan Shomof, Dolores Guarnaccia, Leo Pustilnikov, Others [Dkt. No. 4625-4, Ex. 12]
7	Email Chain Between Jonathan Shomof, Izek Shomof, Leo Pustilnikov, Others Re: "La Boyle, CA – Status Update" [Dkt. No. 4625-4, Ex. 13]
8	Email Chain Between Jonathan Shomof, Dolores Guarnaccia, Leo Pustilnikov, Others Re: "LA Boyle Visit" [Dkt. No. 4625-4, Ex. 14]
9	Email Chain Between Jonathan Shomof, Dolores Guarnaccia Re: "1008 Historical Pic – Window Openings on Olympia" [Dkt. No. 4625-4, Ex. 15]
10	Email Chain Between Jonathan Shomof, Leo Pustilnikov, Dolores Guarnaccia, Damon Guy, Others Re: "1008 Sears Boyle Heights, CA – Air Conditioning" [Dkt. No. 4625-4, Ex. 16]
11	Photographs labeled "Server Room" [Dkt. No. 4625-4, Ex. 18]
12	Photographs labeled "Facade and Signage" [Dkt. No. 4625-4, Ex. 19]
13	Photographs labeled "HVAC Equipment Installed on the Roof" [Dkt. No. 4625-4, Ex. 20]
14	Photographs labeled "HVAC Equipment Installed on the Roof" and "HVAC Equipment Stored on Premises Waiting to be Installed" [Dkt. No. 4625-5, Ex. 21]
15	Chart Re: Reimbursement Balance for Sears TI Construction Expenses [Dkt. No. 1837, Ex. C]
16	Chart re: Sears Project Cost Breakdown [Dkt. No. 3477, Ex. B]

DEPOSITION TRANSCRIPTS

Document
Transcript of the Deposition of Izek Shomof, taken on June 24, 2019, with Transform's designations and Landlord's counter-designations, attached hereto as Exhibit B in accordance with Rule 8009-1(a) of the Local Bankruptcy Rules for the Southern District of New York

RESERVATION OF RIGHTS

Appellant expressly reserves its right to amend or supplement this Designation and/or to object, or otherwise supplement or move to strike or modify, some or all of any designation filed by any other party to this appeal. This filing is made expressly subject to, and without waiver of, any and all rights, remedies, challenges and objections.

Dated: September 3, 2019
Los Angeles, California

By: /s/ David S. Kupetz
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*Counsel for Izek Shomof and Aline Shomof Irrevocable
Children's Trust Dated February 11, 1999,
Vegas Group, LLC, and East River Group, LLC*

EXHIBIT A

Page 1

1

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 18-23538-rdd

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8 In the Matter of:

9

10 SEARS HOLDINGS CORPORATION, et al.,

11

12 Debtors.

13

14 - x

15

16 United States Bankruptcy Court

17 300 Quarropas Street, Room 248

18 White Plains, New York 10601

19

20 August 2, 2019

21 10:08 AM

22

23 BEFORE:

24 HON. ROBERT D. DRAIN

25 U.S. BANKRUPTCY JUDGE

Page 2

1 18-23538-rdd Sears Holdings Corporation, et al.

2 Ch 11

3

4 HEARING re Statement/Notice of Assumption and Assignment of
5 Additional Designatable Leases [ECF No. 3298]

6

7 HEARING re Objection to Cure Amount for Store #1008 Filed by
8 Izek Shomof and Aline Shomof Irrevocable Children's Trust
9 Dated February 11, 1999, Vegas Group, LLC, and East River
10 Group, LLC [ECF No. 1837]

11

12 HEARING re Supplemental Cure Objection and Reservation of
13 Rights (Store #1008) Filed by Izek Shomof and Aline Shomof
14 Irrevocable Children's Trust Dated February 11, 1999, Vegas
15 Group, LLC, and East River Group, LLC [ECF No. 3477]

16

17 HEARING re Declaration of Izek Shomof in Support of
18 Supplemental Cure Objection and Reservation of Rights (Store
19 #1008) Filed by Izek Shomof and Aline Shomof Irrevocable
20 Children's Trust Dated February 11, 1999, Vegas Group, LLC,
21 and East River Group, LLC [ECF No. 3478]

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1 HEARING re So Ordered Stipulation and Order By and Among
2 Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof
3 Irrevocable Children's Trust Dated February 11, 1999, Vegas
4 Group, LLC, and East River Group, LLC (I) Extending Time
5 Under 11 U.S.C. § 365(d)(4) for Assumption or Rejection of
6 Lease of Nonresidential Real Property [ECF No. 3817]

7

8 HEARING re So Ordered Stipulation and Order By and Among
9 Sellers, Buyer, and Landlord Izek Shomof and Aline Shomof
10 Irrevocable Children's Trust Dated February 11, 1999, Vegas
11 Group, LLC and East River Group, LLC (I) Extending Time for
12 Assumption or Rejection of Lease of Nonresidential Real
13 Property and Setting Briefing Schedule [ECF No. 4186]

14

15 HEARING re Transform Holdco LLC's Reply in Support of
16 Assumption and Assignment of Designated Lease for Store
17 Located at 2650 East Olympic Boulevard, Los Angeles,
18 California [ECF No. 4489]

19

20 HEARING re Landlord's Reply to Transform Holdco LLC's Reply
21 in Support of Assumption and Assignment of Designated Lease
22 for Store Located at 2650 East Olympic Boulevard, Los
23 Angeles, California" [ECF No. 4624]

24

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Page 4

1 HEARING re Declaration of Izek Shomof in Support of
2 Landlord's Reply to Transform Holdco LLC's Reply in Support
3 of Assumption and Assignment of Designated Lease for Store
4 Located at 2650 East Olympic Boulevard, Los Angeles,
5 California [ECF No. 4625]

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25 Transcribed by: Lisa Beck, Jamie Gallagher and Pamela Skaw

Page 5

1 A P P E A R A N C E S :

2 WEIL, GOTSHAL & MANGES LLP

3 Attorneys for Debtors and Debtors in Possession

4 767 Fifth Avenue

5 New York, NY 10153

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7 BY: JACQUELINE MARCUS, ESQ. (TELEPHONICALLY)

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15 BY: DAVID S. KUPETZ, ESQ.

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18 Attorneys for Transform Holdco LLC and Its Affiliates

19 One Liberty Plaza

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21

22 BY: ANDREW WEAVER, ESQ.

23 KATE MASSEY, ESQ.

24

25

1 P R O C E E D I N G S

2 THE COURT: All right. Good morning. In re Sears
3 Holdings Corp.

4 MR. WEAVER: Good morning, Your Honor. Andrew
5 Weaver, Cleary Gottlieb, on behalf of Transform.

6 THE COURT: Good morning.

7 MR. WEAVER: This morning we have a lease
8 assumption cure objection matter before Your Honor. The
9 landlord does have a declarant who will be crossed in the
10 courtroom. And then the parties will have argument.

11 There is a little evidentiary issue with some of
12 the exhibits. We're happy to address now, Your Honor, or
13 after the cross of the witness, whatever your preference.

14 THE COURT: Well, I have two binders, one of which
15 is the parties' joint exhibits.

16 MR. WEAVER: Correct, Your Honor.

17 THE COURT: So the admissibility of those is
18 agreed?

19 MR. WEAVER: Correct, Your Honor.

20 THE COURT: Okay.

21 (Joint Exhibits received in evidence)

22 MR. WEAVER: And then I have a binder labeled
23 "Landlord's Exhibit List". I don't know whether all of
24 these are objected to or just some of them?

25 MR. WEAVER: They are. They're buckets, Your

1 Honor, which I can quickly summarize for you.

2 THE COURT: Okay.

3 MR. WEAVER: So, Your Honor, looking at Landlord's
4 Exhibits -- 1, in particular, is a summary document. And
5 presumably, it's being submitted under Rule 1006. Just by a
6 quick glance at the document, there are some errors in the
7 document based upon the evidence that the party -- landlord
8 had submitted. And so, we just don't think the document is
9 necessarily reliable.

10 The second bucket, Your Honor, relates to --

11 THE COURT: Well, on that point --

12 MR. WEAVER: Yeah.

13 THE COURT: -- if you correct the errors, is it
14 then reliable --

15 MR. WEAVER: Well --

16 THE COURT: -- or you just haven't had the chance
17 to do the due diligence and therefore it's --

18 MR. WEAVER: You know, we got this on Friday, Your
19 Honor, so it's been a week. But -- so we really haven't
20 done a thorough due diligence. Look, obviously, Your Honor
21 can -- capable of looking at the evidence. We appreciate
22 that and can disregard what you deem to be not liable. But
23 we just found not having really -- it tied out to anything
24 in particular, we found to be a little bit problematic.

25 THE COURT: Okay.

1 MR. WEAVER: That relates, Your Honor, to the
2 second bucket which is Landlord Exhibit 2, 3 and 4. These
3 are invoices and checks which presumably are the backup for
4 number 1. And these documents, Your Honor, were provided
5 for the first time on Friday as part of the surreply and
6 attached to the declaration. We served discovery in May in
7 this case. We deposed their declarant in June in this case.
8 And we just now, a week ago, received the materials.

9 Again, as a general matter, we find this to be
10 parol evidence that you don't need to get to because the
11 contracts, we think, are clear, Your Honor. But we just
12 believe that, as a procedural matter, that's improper when
13 they were clearly called for in discovery. We had a
14 deposition and then we get these documents at the eleventh
15 hour.

16 THE COURT: Okay.

17 MR. WEAVER: The next bucket, Your Honor, is
18 Landlord Exhibit 5, 6, 7, 8, 9 and 10. These are e-mails,
19 Your Honor, that, if you look at them all, they are all
20 e-mails that were forwarded by the landlord to his counsel
21 that has a commentary at the beginning of each -- of the
22 forward chains. But the timing is also the issue, Your
23 Honor. The deposition took place on June 24th in L.A. All
24 of these e-mail chains were sent either during the
25 deposition or after the deposition to counsel. So we did

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1 receive them. They were produced a couple days later to us.
2 But the point of the deposition, Your Honor, was to ask
3 questions about the evidence they're relying upon. And a
4 significant portion of the evidence they want to rely upon
5 now are documents that they found during and after the
6 deposition and forwarded it along. So we think, again,
7 procedurally, Your Honor, that is improper beyond the parol
8 evidence issue. And the mere fact that there is commentary
9 at the start of many of these chains, Your Honor, would not
10 make these appropriate exhibits for evidence in this matter.

11 THE COURT: Well, I can always disregard the
12 commentary.

13 MR. WEAVER: Absolutely, Your Honor. Your choice.

14 THE COURT: Okay.

15 MR. WEAVER: And then the next bucket, Your Honor,
16 is Exhibits -- Landlord's Exhibits 11, 12, 13, 14 and 15 --
17 I'm sorry -- through 14. These are photographs that, again,
18 we were just given on Friday. The only backup for these
19 photographs is that the declarant said they were taken at
20 his direction. Again, these would be clearly responsive to
21 discovery. We didn't get a chance to depose the witness on
22 this information. Again, I don't think it's probative at
23 all in any way, Your Honor, but, again, this seems
24 procedurally improper.

25 THE COURT: Okay.

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1 MR. WEAVER: And I believe Landlord Exhibit 15 is
2 another summary document. This relates to certain wire
3 transfers. I don't think the wire transfers are in dispute
4 here, Your Honor. We just don't know where this document
5 really is sourced from. Frankly, if this were admitted, we
6 don't think we would have a serious concern but, again, it's
7 just from a procedural standpoint.

8 And then finally, Exhibit 16 is also a summary
9 document. This was attached earlier to a supplemental cure
10 objection in May. There was no backup. Presumably this
11 ties to Exhibit 1 as well and presumably ties to the
12 invoices we've just received. But again, I'm just not sure
13 without much more sourcing than that that it's reliable
14 under the rules, Your Honor.

15 THE COURT: Okay. All right. Was there an
16 agreement on discovery just to when it would be provided?
17 When was the discovery request made?

18 MR. WEAVER: Your Honor, the discovery request was
19 made on May 17th. And there was an agreement to produce on
20 June 17th, a week before the deposition. I can read you the
21 discovery request, Your Honor, but they are as you would
22 imagine, the documents they relied upon to support their
23 cure claim.

24 THE COURT: Okay.

25 MR. KUPETZ: Good morning, Your Honor. David

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1 Kupetz with SulmeyerKupetz, appearing on behalf of landlord
2 which is the Shomof trust, Vegas Group and East River Group.

3 THE COURT: Good morning.

4 MR. KUPETZ: Your Honor, with respect to these
5 evidentiary objections, I'd like to first, if the Court will
6 allow, address Landlord's Exhibits 5 through 10 because that
7 has some carryover with respects to some of the other
8 issues.

9 Those requests were not covered in any way by
10 Transform's discovery documents and -- request document
11 which I have if the Court would like to look at it. I have
12 copies of Transform's discovery requests. It became only
13 apparent during Mr. Shomof's deposition on June 24th. And,
14 of course, Mr. Shomof is present in the courtroom, Your
15 Honor, because he's the declarant and can be cross-examined.

16 It became only apparent for the first time that
17 these e-mails were relevant to show, of course, the
18 performance. Certainly, that was never an issue raised by
19 Sears. The landlord had been working with Sears. Part of
20 the argument here is --

21 THE COURT: Can I see the discovery request?

22 MR. KUPETZ: Yes, Your Honor. May I approach?

23 THE COURT: Sure.

24 (Pause)

25 THE COURT: Okay. You can go ahead.

1 MR. KUPETZ: So these e-mails were produced in
2 real time, a good portion of them, actually during the
3 deposition because during the deposition for the first time
4 it became apparent to myself and to the landlord that
5 Transform was taking a position different from Sears that
6 this April 1st, 2017 completion deadline was the real
7 deadline date that hadn't been modified by the course of
8 performance by the parties. And therefore, we had these
9 messages forwarded immediately. And we handed what we could
10 during the deposition. Given the timing -- I think the
11 deposition ended at 3:15 p.m. or something like that. A
12 number of these messages were located very quickly by my
13 client's representatives who weren't at the deposition.
14 There were several that were at the deposition besides Mr.
15 Shomof. And there were then subsequent messages that were
16 discovered in the next couple of days were then uploaded to
17 ShareFile. And they were used in the declaration as
18 exhibits in the same form as they were produced to
19 Transform. And the Court can disregard the forwarding
20 message. I'd ask the Court to disregard that forwarding
21 message. There's no real substance there. We're not
22 intending -- it's not like a jury or something where there's
23 going to be some influence.

24 Also, the parol evidence rule does not apply as
25 set forth in the reply, which is ECF number 4624 at page 5.

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1 Under California law, which the parties concede is the
2 governing law here, "Course of performance can supplement,
3 qualify or modify contrary terms in a contract." And as the
4 district court said in the Facebook case, and that's cited
5 at page 5 of the reply: "California case law recognizes
6 that course of performance evidence is allowed to explain or
7 supplement integrated contracts" --

8 THE COURT: Right. Not modify.

9 MR. KUPETZ: No. It does talk about modify as
10 well. But it explains supplement or modified. The quote
11 there, though, is "explain or supplement integrated
12 contracts" --

13 THE COURT: Right. Exactly.

14 MR. KUPETZ: -- "even when the contract" --

15 THE COURT: Listen, I will hear from the other
16 side where their course of performance issue as far as the
17 rights to the money and the deposit was raised at any time
18 before the June cut off --

19 MR. KUPETZ: Understood.

20 THE COURT: -- date.

21 MR. KUPETZ: Understood, Your Honor. Just in
22 terms of procedurally, how this worked, as the Court, I
23 think, is aware, all that -- when the landlord filed its
24 original cure objection and the supplemental cure objection,
25 all we saw was the amount set forth --

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1 THE COURT: Which was zero.

2 MR. KUPETZ: -- for the cure was zero.

3 THE COURT: I understand. But I don't know if
4 there were discussions about -- or if people just went right
5 to discovery. So were there discussions about the escrow --
6 the deposit? It's actually not held in escrow, right? Is
7 there an escrow agent?

8 MR. KUPETZ: There is not, Your Honor.

9 THE COURT: So it's just a deposit.

10 MR. KUPETZ: The agreement --

11 MR. WEAVER: A deposit, Your Honor.

12 MR. KUPETZ: -- contemplated an escrow agent but
13 then the parties between themselves agreed never to use an
14 escrow agent.

15 THE COURT: All right.

16 MR. KUPETZ: So the --

17 THE COURT: So was there a discussion about the --
18 what happened to the escrow -- the timing issue, et cetera,
19 before the June 17 cutoff date?

20 MR. WEAVER: Your Honor, there was not really
21 substantive discussions amongst the parties --

22 THE COURT: Right.

23 MR. WEAVER: -- as to the legal matters. No,
24 there weren't.

25 THE COURT: So I'll admit those documents over the

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1 objection that they were produced late. As far as their use
2 and their admissibility, I'll wait to hear the rest of the
3 evidence --

4 MR. KUPETZ: Okay. Thank you, Your Honor.

5 THE COURT: -- as far as how they might be used if
6 at all.

7 MR. KUPETZ: Understood, Your Honor.

8 THE COURT: Okay.

9 MR. KUPETZ: With respect to Landlord's Exhibit 1,
10 it's really presented as an illustrative summary. It's
11 referenced in paragraph 16 of the Shomof declaration, ECF
12 number 4625. The invoices and checks are referenced in
13 paragraphs 30 and 31 of the declaration.

14 THE COURT: All right. But if it doesn't foot,
15 it's really not helpful. It's actually not -- to the
16 opposite. It's potentially prejudicial. So you tell me
17 that the underlying documents are in evidence. We'll just
18 rely on those.

19 MR. KUPETZ: And with respect to Exhibits 2, 3 and
20 4, those are copies of the underlying documents that are
21 referenced in Exhibit 1 and are also referenced in paragraph
22 16 of the Shomof declaration, ECF 4625.

23 THE COURT: Right. But I think this was a post-
24 discovery cutoff date objection, too. So were other
25 invoices produced and not these?

1 MR. KUPETZ: I think the other invoices were
2 produced. It was not any intent to omit any. There may
3 have been a couple that weren't produced previously. It
4 wasn't by -- it certainly wasn't by design.

5 THE COURT: Okay. Well, I've not reviewed these
6 three exhibits. If they are not admitted -- I mean, they're
7 part of the cure claim, right? They serve a base for the
8 cure claim? What is the --

9 MR. KUPETZ: There are some underlying --

10 THE COURT: What are the invoices for?

11 MR. KUPETZ: They're underlying backup material
12 that shows -- may not be necessary but underlying backup
13 material that shows the work that was done and then billed
14 to the landlord for which the landlord seeks reimbursement
15 from --

16 THE COURT: But work done in connection with what?

17 MR. WEAVER: Your Honor, I think to that
18 question's very clear. This is for work that was done,
19 invoiced and paid by the tenant. That's what the
20 declaration says. And if you want, Your Honor, we can cross
21 on this and you can decide whether or not they're
22 admissible.

23 THE COURT: I'll decide when I hear --

24 MR. WEAVER: Okay. It's based --

25 MR. KUPETZ: Your Honor, just --

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1 THE COURT: No. I'm not going to rule on this
2 now. I'll decide when we have the examination.

3 MR. WEAVER: Thank you, Your Honor.

4 MR. KUPETZ: I think the only additional ones --

5 THE COURT: Photographs --

6 MR. KUPETZ: Yeah.

7 THE COURT: -- and the two charts.

8 MR. KUPETZ: Right. So the photographs are really
9 just -- they're illustrative of the testimony that appears
10 in paragraphs 33 and 34 of the declaration. And just shows
11 the Court exactly what the declarant is speaking of there.
12 He had these photographs taken under his direction.

13 THE COURT: I don't think I need them. I think
14 they're irrelevant.

15 MR. KUPETZ: Okay.

16 THE COURT: So I'll exclude those.

17 MR. KUPETZ: And then with respect -- I think the
18 remaining ones, Your Honor, Exhibit 15, I believe --

19 THE COURT: Right. To the extent it's relevant,
20 I'll admit this.

21 MR. KUPETZ: I mean, I think I heard counsel they
22 didn't really have an objection but I may have misheard.

23 THE COURT: Yeah. Well --

24 MR. WEAVER: There's no debate, I think, Your
25 Honor, that money came in, some money came out. I don't

1 think --

2 THE COURT: And there are no issues about
3 inaccuracy on this one, right?

4 MR. WEAVER: Correct.

5 THE COURT: All right.

6 MR. WEAVER: Yeah. I just don't know the source
7 of it, et cetera. I just think to the extent the parties
8 are not debating the fact that money came in and some money
9 came out, I don't think it's necessarily --

10 THE COURT: Well, this has a specific dollar
11 figure attached to it, right?

12 MR. WEAVER: Correct, Your Honor. I don't think
13 the dollar amount is in dispute. I think --

14 THE COURT: It's not. Okay.

15 MR. WEAVER: For what was deposited and what has
16 been paid to the landlord by the tenant, there's no debate
17 about that, Your Honor.

18 THE COURT: All right. So that's fine. So this
19 is admitted now.

20 MR. KUPETZ: And, Your Honor, the final one is
21 Exhibit 16 which is a document that came from the
22 supplemental cure objection which is ECF 3477. And what it
23 does is it just provides a detail breakdown of the
24 supplemental cure amount of 5,696,000 which is set forth as
25 well in the declaration in less detail. This provides a

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1 breakdown of the various categories.

2 THE COURT: But I don't have the actual invoices
3 or checks or anything like that.

4 MR. KUPETZ: I'm not sure. I think that's right
5 but I have to --

6 THE COURT: So I can't admit a summary of
7 something that's not in the record. So that one's out.

8 So just to summarize then, Exhibit 1 in this
9 landlord exhibit list is not admitted. The Exhibits 2
10 through 4 I'll determine as far as how they'll be used, if
11 at all, but otherwise would be admitted.

12 (Landlord's Exhibits 2 through 4 conditionally received
13 in evidence)

14 THE COURT: The e-mails in 5 through 9 are
15 admitted except for the commentary which I'll disregard.
16 I'm sorry. 5 through 10. Excuse me.

17 (Landlord's Exhibits 5 through 10 received in evidence)

18 THE COURT: And then 11 through 14 are not
19 admitted. 15 is admitted and 16 is not admitted.

20 (Landlord's Exhibit 15 received in evidence)

21 MR. KUPETZ: Thank you, Your Honor.

22 THE COURT: Okay.

23 MR. WEAVER: Thank you, Your Honor.

24 MR. KUPETZ: Your Honor, if the Court will allow,
25 I'm prepared to present Mr. Shomof and -- again, if the

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1 Court will allow, have his declarations admitted as his --
2 or adopted as his direct testimony.

3 THE COURT: Okay. That's fine. And just to be
4 clear, those are the May 1, 2019 declaration and the July
5 26, 2019 declaration? Are those the two? They're in my
6 binder. It's not an exhibit binder but it's the hearing
7 binder. They're tabs --

8 MR. KUPETZ: Yes.

9 THE COURT: -- 2 and 6.

10 MR. KUPETZ: Definitely the July 26th.

11 THE COURT: I'm sorry. 3 and 6. Excuse me. Not
12 2. 3 and 6.

13 MR. KUPETZ: Yeah. That's correct, Your Honor.

14 THE COURT: Okay. So do you want to cross-examine
15 Mr. Shomof?

16 MR. WEAVER: I do, Your Honor.

17 THE COURT: All right. So can you take the stand?
18 (Pause)

19 THE COURT: Would you raise your right hand,
20 please?

21 IZEK SHOMOF, WITNESS, SWORN

22 THE COURT: And would you please spell your name
23 for the record?

24 THE WITNESS: Good morning, Your Honor. My name
25 is Izek Shomof, I-Z-E-K, Shomof, S-H-O-M-O-F.

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1 THE COURT: Okay. Now, Mr. Shomof, you submitted
2 two declarations in support of what I'll refer to as the
3 landlord's objection. It's the Izek Shomof/Aline Shomof
4 Irrevocable Children's Trust, Vegas Group, LLC and East
5 River Group, LLC but I'll refer to them as the landlord.

6 So you submitted two declarations in support of
7 the cure objection to -- in connection with the motion to
8 assume and assign the lease of the store in Los Angeles.

9 The first declaration is dated May 1, 2019 and the
10 second is dated July 26, 2019. You recall both of those
11 declarations?

12 THE WITNESS: I do.

13 THE COURT: Sitting here today knowing that they
14 would constitute your direct testimony in this contested
15 matter, do you still want that to be your direct testimony?

16 THE WITNESS: Yes.

17 THE COURT: And is there anything that you would
18 change in them knowing that it would be your direct
19 testimony?

20 THE WITNESS: Yes.

21 THE COURT: Okay. And what would that be?

22 THE WITNESS: What --

23 THE COURT: What would you change?

24 THE WITNESS: No. I do not need to change.

25 THE COURT: There's nothing that you would --

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1 THE WITNESS: No change.

2 THE COURT: -- change --

3 THE WITNESS: No.

4 THE COURT: -- as your direct testimony.

5 THE WITNESS: So --

6 THE COURT: Okay. All right. So I will admit each
7 of them as Mr. Shomof's direct testimony.

8 (Declaration of Izek Shomof dated May 1, 2019 received
9 in evidence)

10 (Supplemental declaration of Izek Shomof dated July 26,
11 2019 received in evidence)

12 MR. WEAVER: Your Honor, I have a cross binder for
13 the witness and Your Honor, if I may approach?

14 THE COURT: Okay.

15 MR. WEAVER: Thank you, Your Honor.

16 THE COURT: Uh-huh.

17 CROSS-EXAMINATION

18 BY MR. WEAVER:

19 Q Good morning, Mr. Shomof.

20 A Good morning.

21 Q I want to start with the construction estimate deposit.
22 And so this is tab 6 in your binder. This is the 2015
23 amendment. And looking just in general on pages 3 and 4 and
24 5, under this amendment, you agreed, Mr. Shomof, to perform
25 work related to low voltage services, HVAC, plumbing,

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1 façade, signage and freight elevators. Correct?

2 A Now let's go back for a second. You said page --

3 Q I'm sorry, Mr. Shomof. In tab 6, if you look -- you
4 know, it's a little easier if we use the ECF pages. So at
5 the top of the page, you'll see page 16 of 135. You see
6 that?

7 A Page 16?

8 Q Of 135 at the top.

9 A Okay.

10 Q And you'll see that there's page 17 of 135 at the top
11 and page 18 of 135 at the top. Do you see that?

12 MR. WEAVER: Your Honor, may I just --

13 THE COURT: So it's paragraphs 3 through --

14 MR. WEAVER: 3 through 10.

15 THE WITNESS: 16 of 135. Yeah, I do see it.

16 THE COURT: 3 through 10.

17 MR. WEAVER: Okay.

18 THE COURT: Okay.

19 BY MR. WEAVER:

20 Q So under this 2015 amendment, Mr. Shomof, you as a
21 landlord agree to do work related to low voltage, HVAC,
22 plumbing, façade, signage, seismic work and freight
23 elevators. Correct?

24 A Correct.

25 Q And under this agreement, you as a landlord agreed to

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1 complete this work by April 1st, 2017, correct?

2 A Yes.

3 Q And you did not complete all of that work by April 1st,
4 2017, correct?

5 A We did not due to the agreement that we had with Sears
6 that it should continue.

7 Q Mr. Shomof, my question is you did not complete the
8 work by April 1st, 2017. Correct?

9 A Correct.

10 Q Now if you turn to paragraph 25, Mr. Shomof, and this
11 is found on page 28 of 135, again, still in tab 6, and under
12 this agreement, you as a landlord provided the tenant with a
13 \$3.25 million construction estimate deposit. Correct?

14 A Yes.

15 Q And that was to "partially secure Landlord's design,
16 repair, construction and completion obligations under [the]
17 amendment". Correct?

18 A Correct.

19 Q Now if you turn the page to subparagraph (d), Mr.
20 Shomof, also under this agreement, you agreed, under Section
21 (d), "In the event Landlord does not complete the work
22 contemplated in Sections 3, 4, 6 and 7" -- so that relates
23 to low voltage, HVAC, façade and signage -- "by April 1,
24 2017, the remainder of [the] funds in the Construction Fund
25 Escrow shall be released to [the] Tenant, at Tenant's

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1 election, so that [the] Tenant [may] cause...work to be
2 completed and [that] Tenant [may] be entitled to payment[s]
3 by [the] Landlord [of] any additional amounts necessary to
4 complete the work."

5 You agreed to that. Correct, Mr. Shomof?

6 A We agreed to the tenant election but tenant did not
7 elect for me to stop work and they will continue the work.

8 Q Mr. Shomof --

9 A The tenant election was to ask to proceed with the work
10 after April 1st.

11 Q My question is, Mr. Shomof, you agreed to this
12 provision, correct?

13 A Yes.

14 Q And also you agreed that, under this provision, to the
15 extent that you the landlord timely complete the work in a
16 manner that's acceptable to the tenant "any remaining
17 Construction Estimate Deposit[s]" will be dispersed to you
18 subject to review and approval. Correct?

19 A Correct.

20 Q Now, Mr. Shomof, the parties -- that is, the landlord
21 and the tenant -- did not enter into a written agreement to
22 adjust the April 1st deadline, correct?

23 A Not exactly correct, no.

24 Q Is there a written agreement between the landlord and
25 the tenant to adjust the April 1st deadline? Yes or no, Mr.

1 Shomof?

2 A It's not a yes or a no question. There is an e-mail
3 from Delores allowing us to proceed with the work after
4 April 1.

5 Q We're going to come to that e-mail. I think it's in
6 May of 2017. But what I'm asking, Mr. Shomof, is there a
7 document --

8 A Yeah. It's a month later.

9 Q Is there a document signed by you the landlord or your
10 representative and the tenant that adjusts the April 1st
11 deadline? Yes or no?

12 A A signed agreement, no, but there is an e-mail that's
13 allowing us --

14 Q Thank you, Mr. Shomof.

15 Now, Mr. Shomof, you attached to your declaration a
16 number of invoices that you claim that you as the landlord
17 sent to the tenant and that the tenant then subsequently
18 paid. Is that correct?

19 A Correct.

20 Q Okay. We'll look at a few of those if we could. So if
21 you'd turn to tab 7, Mr. Shomof -- I'm sorry. Not tab 7.
22 If you look to tab 8 -- I apologize. Tab 8, Mr. Shomof.
23 This is Joint Exhibit number 4 which was the Exhibit number
24 2 to your declaration. Now this, Mr. Shomof, is an invoice
25 dated August 16th, 2017, invoice number 08001PR, in an

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1 amount of just north of 1.5 million. Correct?

2 A Correct.

3 Q Okay. If you turn to tab 9, Mr. Shomof, this is Joint
4 Exhibit 5, number 3 to your declaration. This here is
5 another invoice also dated April (sic) 16th, 2017. It's
6 also invoice number 08001PR. But this is in the amount of
7 478,000, correct?

8 A Correct.

9 Q And on this document is a paid stamp of 8/12/17,
10 correct?

11 A Correct.

12 Q If you turn the page, Mr. Shomof -- this is still
13 within that tab -- you'll see yet another invoice also dated
14 August 16th, 2017, also numbered 08001PR, again in the
15 amount of 478,000 but this has a paid stamp of 8/18/17.
16 Correct, Mr. Shomof?

17 A Are we looking at the same invoice copied twice?

18 Q Mr. Shomof, this is attached to your declaration. I'm
19 just asking you if this is the evidence that you've
20 submitted to the Court.

21 A Yes. Yes.

22 Q Now, Mr. Shomof, if you turn to tab 10, tab 10 is Joint
23 Exhibit 6, number 4 to your declaration. This is another
24 invoice dated August 16th, 2017. This one is invoice number
25 08002PR. And this has a number -- amount just north of one

1 million dollars. Correct?

2 A Correct.

3 Q If you turn to tab 11, Mr. Shomof, this is Landlord
4 Exhibit number 2, another invoice dated August 16th, 2017.
5 Again, the number 08002PR, but this one's in the amount of
6 983,000. Correct?

7 A Correct.

8 Q And finally, Mr. Shomof, if you look at tab 12, this is
9 Joint Exhibit 7, number 6 to your declaration, another
10 invoice from August 16th, 2017. This one is numbered
11 08002A. And this is in the amount of \$18,853, correct?

12 A Correct.

13 Q Okay. Now in addition to these invoices, Mr. Shomof,
14 you also attach to your declaration a set of backup invoices
15 and checks, correct?

16 A Correct.

17 Q And this is a backup, the invoices and checks, that
18 went to you or paid by you that were the backup for invoices
19 you sent to Sears that Sears then paid, correct?

20 A Correct.

21 Q Now, Mr. Shomof, they were Exhibits 5, 8 and 10 to your
22 declaration. They're Landlord Exhibits 2, 3 and 4. There's
23 approximately 300 pages here, Mr. Shomof. You're familiar
24 with these documents, correct?

25 A I am -- I have not reviewed every -- each of the

1 document.

2 Q You attached this to your declaration, did you, Mr.
3 Shomof?

4 A Yes, but not in detail. Yes.

5 Q And you swore under oath that this was the backup for
6 those invoices, correct?

7 A Correct, yes.

8 Q Mr. Shomof, how many of these invoices and checks are
9 dated after April 1st, 2017?

10 A I am not sure.

11 Q You're not sure.

12 A No.

13 Q Well, I just received these on Friday but we've gone
14 through these, Mr. Shomof. And I can represent to you that
15 only 14 of these invoices are dated after April 1st, 2017.
16 Do you have any reason to doubt that representation?

17 A I just don't remember it but I shall review it again.

18 Q And those 18 add up to less than \$80,000. Again, any
19 reason to doubt that representation?

20 A Could very much be.

21 Q Okay. And some of these invoices, Mr. Shomof, date
22 back to 2014, correct?

23 A Yes.

24 Q And some of them date back to 2015, correct?

25 A Correct.

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1 Q And there are no invoices in the backup you provide to
2 this Court dated after 2017, correct?

3 A There are.

4 Q Invoices within these three exhibits, Mr. Shomof?

5 A Invoices from my company to Sears.

6 Q Understood. I'm not asking about the single-page
7 invoices that you sent to Sears. I'm talking about the
8 backup, the work that was actually done. There are no
9 invoices submitted to this Court dated after 2017, correct?

10 A The work that we have done and a third party that have
11 done work, but there is other work that we have done that
12 our labor worked and we billed Sears for it.

13 Q Mr. Shomof, you testified -- in your declaration, you
14 wrote that this is the backup for the invoices that you
15 submitted to Sears that Sears has paid. Correct?

16 A Correct.

17 Q Thank you.

18 Now let's look at that e-mail that we were talking
19 about. It's tab 15 in your binder, Mr. Shomof. Now this is
20 the e-mail you were referencing earlier, correct, with
21 Dolores from Sears?

22 A Yes.

23 Q Okay. And if you go to the end of the e-mail chain --
24 just for reference, it begins in May of 2017. Correct?

25 A It's such a small print I cannot see it.

1 Q I'm sorry, Mr. Shomof. This is what was produced
2 attached to your declaration. So I apologize for that. I
3 can represent to you, Mr. Shomof, that the e-mail's dated
4 May 11th, 2017. Are you okay with that representation?

5 A Yes.

6 Q Okay. So this e-mail that you've pointed to was after
7 the April 1st, 2017, correct?

8 A Correct.

9 Q And in the e-mail on the first page -- right? Again, I
10 apologize that the font is small. It's May 11th at 2:17.
11 This is an e-mail from Dolores. Dolores acknowledges in the
12 e-mail that you've missed the deadline of April 1st, 2017.
13 Correct?

14 A Yes.

15 Q And then she goes on to say, "With that being said" --
16 or "that being the case, I'm asking that the HVAC and the
17 seismic work be done at the same time. The expense of
18 moving product and fixtures will be double if we need to do
19 it twice. This is a great store for Sears and we do not
20 want to affect the customers or associates more than
21 needed." Correct?

22 A Yes. But I think you missed the paragraph when she
23 said speak to legal and legal will -- and then she said
24 after -- legal will approve it.

25 Q Well, let's look at her words, Mr. Shomof. It says "I

1 have spoken to legal" --

2 A If you don't mind, yeah. It sounds --

3 Q -- "and here are my remarks."

4 A -- like -- now what -- sorry.

5 Q "I've spoken to legal and here are my remarks." That's
6 what Dolores wrote, correct?

7 A Yeah.

8 Q Okay. And so she acknowledged in the e-mail that you
9 had missed the deadline. Correct?

10 A Yes.

11 Q And she said, in light of that, they want you to do the
12 HVAC and the seismic together, correct?

13 A Yes.

14 Q Okay. And her assumption, if you look down in the next
15 paragraph, was the seismic work -- the permits we pulled
16 later that year, 2017, and the work will begin in January
17 2018. Correct?

18 A Yes.

19 Q Okay. And above your associate, Leo, writes as it
20 relates to the seismic -- it's number 2 in the top e-mail:
21 We "anticipate having permits around September of this year
22 and the goal beginning early 2018." Is that right?

23 A Correct.

24 Q Okay. Now I want to turn to the latest invoice, Mr.
25 Shomof, that you had provided, which is tab 17 in your

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1 binder. Now this, Mr. Shomof, is Joint Exhibit number 10.
2 It was attached as Exhibit 17 to your declaration. But it's
3 also the invoice that was attached in January in support of
4 your original cure objection. Do you see that?

5 A Yes.

6 Q And this is in the amount -- it's dated January 23rd,
7 2019. It's in the amount of just over 322,000, correct?

8 A Correct.

9 Q And this invoice has an assumption in it, doesn't it?

10 A What do you mean by --

11 Q If you look in the middle, there's an asterisk. And
12 there's a note halfway down that says "Assuming Sears" --

13 THE COURT: I'm sorry. What exhibit is this?

14 MR. WEAVER: I'm sorry. We're in tab 17, Your
15 Honor --

16 THE COURT: Of the witness binder?

17 MR. WEAVER: -- of the cross binder but it's also
18 Joint Exhibit number 10.

19 THE COURT: Okay. Fine.

20 MR. WEAVER: Apologize, Your Honor.

21 THE COURT: Okay.

22 BY MR. WEAVER:

23 Q So there's an assumption in the middle of this invoice,
24 correct?

25 A Yes. Correct.

1 Q And that assumption is that Sears did not pay for the
2 equipment, correct?

3 A Yes. We will bill that amount -- we had the invoices
4 sitting on the table and we were trying to clarify Sears
5 paid for it or not. We have not gotten no answer. So we
6 said assuming Sears did not pay that amount, 322,649 is
7 owed.

8 Q You didn't know whether or not you'd been paid,
9 correct, Mr. Shomof?

10 A We did not know if Sears paid it to the third party.

11 Q Ahh. So they could have paid it to the third party,
12 Mr. Shomof. But you're seeking to recover it here, correct?

13 A Assuming -- if you look at what it says in the middle,
14 assuming that Sears did not pay for it. Yes.

15 Q Mr. Shomof, you provided absolutely no backup for this
16 invoice, correct?

17 A What -- the backup that we provided, that 75 percent --
18 the actual fact of the (indiscernible) that 75 percent of
19 the work is completed. And we showed it in the pictures.
20 And the pictures -- you asked for the judge to basically
21 omit it.

22 Q Mr. Shomof, you provided absolutely no backup to this
23 invoice, correct?

24 A No backup for the \$205,000 if it was paid or not, we
25 didn't know.

1 Q No backup for the 322,000 you're claiming through this
2 invoice. Correct, Mr. Shomof?

3 A Backup to you or backup to Sears?

4 Q In this case. Backup in this case.

5 A I have to look into it. No, I'm not sure.

6 Q It's not attached to your declaration, correct, Mr.
7 Shomof?

8 A If it's not then it's not --

9 Q It's not.

10 Now let's turn to the seismic retrofit, Mr. Shomof.
11 And for this, we'll probably go back to tab 6, which is the
12 2015 amendment. And Mr. Shomof, under the 2015 amendment,
13 you as the landlord agreed to be responsible for all the
14 costs, correct?

15 A Responsible of all the -- which costs?

16 Q All the costs associated with the construction called
17 for in the amendment. Correct?

18 A Yes.

19 Q Okay. And if you look at paragraph 8, which is page 17
20 of 135. We're still in tab 6. This is Joint Exhibit number
21 2.

22 A Yes.

23 Q Under "Seismic Work", you agreed that you were
24 responsible for all necessary seismic repairs and
25 improvements, correct?

1 A Yes.

2 Q And you also agreed that you would take best efforts to
3 pull the permits 12 months after the city of Los Angeles
4 approved, correct?

5 A Correct.

6 Q And then 12 months after that to complete the work.
7 Correct?

8 A Correct.

9 Q You also agreed that the plans and specifications,
10 schedules, authorized hours of construction activity and
11 remediation plan for the seismic work would be pre-approved
12 by the tenant pursuant to the demolition and construction
13 protocol attached to the amendment. Correct?

14 A Correct.

15 Q And you also agreed that you would conduct this work in
16 a manner that creates the minimum possible visual and noise
17 inconvenience to the tenant and the customers. Correct?

18 A Correct.

19 Q Now, Mr. Shomof, you pulled the permits for the seismic
20 retrofit in February of this year, correct?

21 A Correct.

22 Q Now your son, Jonathan, sent a letter to counsel for
23 Sears, for the tenant, in September of 2018, correct?

24 A Correct.

25 Q And this is tab number 18 in your binder. It is Joint

1 Exhibit number 3. Let me know when you're there, Mr.

2 Shomof.

3 A I'm here. I've seen it.

4 Q And in this letter, Jonathan says, "Hopefully, Sears
5 will agree to close from February 1st, 2019 to August 15,
6 2019." Correct?

7 A Correct.

8 Q Now nowhere in this letter, that's tab 18, is there a
9 detailed scope of work or detailed set of construction
10 plans, correct?

11 A Yes. What scope of work there is attached. If you
12 look at Exhibit 3 --

13 Q Well --

14 A -- it basically detail how we're going to -- how we're
15 going to be -- start the job and setting up what is --

16 Q Is that the picture, Mr. Shomof? I'm sorry. This one
17 doesn't have page numbers. I apologize.

18 A Picture of detail of how will it be. And with
19 timeline. Again, on Exhibit 3, the page after that --

20 Q And we'll come back to the timeline in a second. But
21 there's no construction plans here, correct, Mr. Shomof?

22 A Assuming Sears will want to proceed with continuing,
23 plans will be submitted. The plan is the size of -- we have
24 plans this size of my stand where I'm sitting.

25 Q So you were looking for a negotiation. Correct, Mr.

1 Shomof?

2 A I was not looking for negotiation. I was looking to
3 agree on strategy how we're going to start construction.

4 Q So this related to strategy, not the actual
5 construction plans. Correct, Mr. Shomof?

6 A Can you repeat it?

7 Q This related to a strategy issue not the actual
8 construction specifics. Correct, Mr. Shomof?

9 A Actual construct -- we were planning to start
10 construction in February.

11 Q But there's no plans in this letter, correct?

12 A Well --

13 Q Yes or no, Mr. Shomof?

14 A Well, there is not, no.

15 Q Okay.

16 A There is not.

17 Q Right. And there is a timeline you said, Mr. Shomof,
18 in here. And this timeline assumes, does it not, that Sears
19 would shut down for six months. Correct?

20 A Yes.

21 Q There's no other timeline in this letter, correct?

22 A In that letter, no.

23 Q Okay.

24 A But probably other ones, yes.

25 Q But this is the only letter you've attached to your

1 declaration, correct, Mr. --

2 A Yes.

3 Q -- Shomof?

4 A This is what we -- we have to seal.

5 Q Okay. And if you look at tab 19, Mr. Shomof, this is
6 the e-mail that Jonathan sent to counsel for tenant that
7 attached the letter at the top. And below there's a
8 response from counsel for the tenant. Correct?

9 A Yes.

10 Q And in that response, counsel says, "To be clear, this
11 letter does not appear to be offered in the spirit in which
12 we discussed it last week. It comes across more as a
13 direction from you as opposed to offering a proposed
14 timeline and outlining some issues that remain to be
15 negotiated before the process begins."

16 A Yes.

17 Q "The history of this project is riddled with errors
18 that have put our employees and patrons at risk and reach
19 negotiated protocols, not to mention broken promises about
20 timing. Just two months ago, you notified us that you would
21 likely not pursue this project."

22 This was the response you got from your letter,
23 correct?

24 A Yes.

25 Q And if you turn the page, Mr. Shomof, at the end of

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1 counsel's response to you, he states: "I have offered to
2 meet with your lawyer so we can start to work through these
3 issues. And I renew this offer." That's what he told you.
4 Correct, Ms. Shomof?

5 A Yes.

6 Q And below that, your son forwards the letter to you and
7 said, "Just want to confirm that you saw this e-mail. Let
8 me know if you want to respond." Correct?

9 A Yes.

10 Q And there is no written response to that e-mail,
11 correct, Mr. Shomof?

12 A It's probably written response from my attorney to him.

13 Q You didn't attach any written response to your
14 declaration, correct, Mr. Shomof?

15 A So you're asking me if I attached a written response or
16 you're asking me if there was a written response to --

17 Q Well --

18 A -- Steve?

19 Q -- Mr. Shomof, all I can do is talk about the evidence
20 that you've tried to put before the Court. And I'm asking,
21 is there any evidence in the record before this Court of a
22 written response to this e-mail. Yes or no?

23 A If you don't have it here then it's not.

24 Q Mr. Shomof, the entitlements issued by the city of Los
25 Angeles, they have not expired yet, correct?

1 A Not yet. We have another probably a lifetime --

2 THE COURT: I'm sorry?

3 A -- or another month.

4 THE COURT: How many --

5 THE WITNESS: Maybe another 30 days before it
6 expiring.

7 BY MR. WEAVER:

8 Q You testified in your declaration that September 16th
9 is the date you provided. Correct, Mr. Shomof?

10 A I testified to what?

11 Q September 16th is in your declaration, correct?

12 A Yes.

13 Q Okay.

14 A It's -- I think it's a little bit before September
15 16th.

16 Q So your declaration isn't correct, Mr. Shomof?

17 A I am not sure. I think it's before. It's -- my
18 deadline was six months from February 16th. So whatever it
19 comes.

20 Q Understood, Mr. Shomof. And on June 24th, Mr. Shomof,
21 when I deposed you, you testified under oath that the
22 project that we're discussing was not dead, correct?

23 A You asked me if the project is dead and I answered back
24 to you I put my lifetime into this project. I want to
25 believe not to. The reason is because I was negotiating

1 with someone to JB and that negotiation fell through.

2 Q Mr. Shomof, if you turn to tab 1 in your binder, that's
3 a copy of your deposition transcript. You remember being
4 deposed on June 24th, Mr. Shomof?

5 A I do, yes.

6 Q Your counsel was there, correct?

7 A Yes.

8 Q Court reporter was there, correct?

9 A Yes, I know.

10 Q You swore to tell the truth at that time?

11 A Absolutely.

12 Q If you would turn with me, Mr. Shomof, to page 146 of
13 your deposition --

14 A What page again?

15 Q 146, Mr. Shomof. And starting on line 20, I'm going to
16 read the question and answer. If you could read along with
17 me, please.

18 "Q Mr. Shomof, is the development plan for Boyle Heights
19 that we've been discussing today dead?

20 "A I hate to say, I literally hate to say even maybe. I'm
21 trying. This is something that is my flux sheet on my
22 projects. I've done 25 other projects. This is the biggest
23 one. This is a -- I put my heart and soul into it. I want
24 to get it to happen and developed. I've been through hell
25 with the financing. I've been through hell with a lot of

1 getting permits. It was hard. The answer is I hope that it
2 is in some way I can maybe salvage it.

3 "Q So the answer is no, it is not dead?

4 "A Yes. The answer is no, it is not dead."

5 Did I read that correctly, Mr. Shomof?

6 A Yes, you did.

7 Q Okay. And in your declaration of July 26th, Mr.
8 Shomof, you testified the first time that during the
9 deposition, you were in discussion with investors for a
10 joint endeavor, correct?

11 A Correct.

12 Q And during the deposition when I asked you about
13 whether or not the project was dead, you didn't say a word
14 about those investors. Correct? Yes or no?

15 A The answer that you -- you've received here I chose the
16 person with hope.

17 Q Understood.

18 A I hoped that the project would not die.

19 Q But you didn't say anything about other investors.
20 Correct, Mr. Shomof?

21 A I was not asked if I have other investors. So I did
22 not say that.

23 Q So you didn't say a single word about other investors
24 when we were talking about whether the project was dead.
25 Correct, Mr. Shomof?

1 A Did you ask me if there was other investors?

2 Q It's a yes or no question, Mr. Shomof.

3 A No. It doesn't say that -- it doesn't say at my
4 deposition what I conduct.

5 THE COURT: I can read the deposition.

6 MR. WEAVER: Understood, Your Honor. I'll move
7 on.

8 BY MR. WEAVER:

9 Q Mr. Shomof, to keep the entitlements valid, you need to
10 begin construction, correct?

11 A Correct.

12 Q And to begin construction, you need to call in an
13 inspector to show that you've started construction, correct?

14 A Correct.

15 MR. WEAVER: No further questions at this time,
16 Your Honor.

17 THE COURT: Okay.

18 (Pause)

19 THE COURT: Any redirect?

20 MR. KUPETZ: Yes. Thank you, Your Honor.

21 THE WITNESS: Your Honor, if you don't mind, can
22 you give me a bottle of water?

23 THE COURT: Sure.

24 THE WITNESS: Thank you.

25 THE COURT: That's fine.

1 THE WITNESS: Thank you very much.

2 REDIRECT EXAMINATION

3 BY MR. KUPETZ:

4 Q Mr. Shomof, I'd like to ask you some questions first
5 with regard to the construction estimate deposit. Prior to
6 the commencement of Sears' Chapter 11 case, what sort of
7 communications were going on with representatives at Sears
8 and the landlord with regard to construction estimate
9 deposit?

10 A Rephrase your question.

11 Q Well --

12 A And if you can speak louder.

13 Q Okay. I'm sorry. I'm sorry. Let me rephrase it.
14 It's too broad a question, I think.

15 After April 1 of 2017 and prior to the commencement of
16 Sears' Chapter 11 case, with respect to the construction
17 estimate deposit, did the landlord and representatives of
18 Sears have ongoing regular communications?

19 A Yes.

20 Q And what was the substance of those communications?

21 A On the continuous work that is happening way after
22 April 1.

23 Q And was Sears' representatives asking the landlord to
24 do certain work covered by the construction estimate deposit
25 after April 1, 2017?

1 A We were doing what was agreed on to do. It may not be
2 completed on April -- before April 1 of 2017. So we were
3 continuing -- continue to finish what left to be done.

4 Q And was --

5 A As of now, it's not 100 percent completed.

6 Q And after April 1st of 2017, was Sears asking you to do
7 that work?

8 A Yes.

9 Q And were the communications between landlord and Sears
10 to the effect that landlord would be reimbursed from the
11 construction estimate deposit for that work?

12 MR. WEAVER: Objection, Your Honor. It's leading,
13 that question, Your Honor.

14 THE COURT: You should rephrase it.

15 BY MR. KUPETZ:

16 Q That work that was being done after April 1, 2017, with
17 respect to the categories covered by the construction -- by
18 the construction estimate deposit --

19 THE COURT: Who was to pay for it? Or how was it
20 to be paid for?

21 THE WITNESS: As agreed on the agreement, as
22 construction proceeding and completing, they would pay us.
23 And they continued paying us after April 1 of 2017. They
24 paid us a year later in 2018, April of 2018. They continued
25 paying us.

1 BY MR. KUPETZ:

2 Q And that payment came from the construction estimate
3 deposit as you understand it?

4 A The payment was coming from the payment -- from the
5 deposits, yes.

6 Q And that was for work done after April 1, 2017.

7 A Correct.

8 Q Now in doing work after April 1, 2017, was Landlord
9 relying on representations of Sears about getting paid?

10 MR. WEAVER: Again, Your Honor. He's testifying
11 here.

12 THE COURT: You have to stop leading.

13 MR. KUPETZ: I'll rephrase it.

14 BY MR. KUPETZ:

15 Q Why did you -- why did Landlord do work after April 1,
16 2017?

17 A Because we owed it as agreed. Job needs to be
18 completed. So we continued doing it after April 1 and -- of
19 2017 and we were getting paid, just like I said before.

20 Q Now is it your understanding -- did Sears make any
21 requests to Landlord with regard to the timing of the work?

22 A Repeat it again.

23 Q With respect, for example, to the HVAC work, was there
24 a request made by Sears?

25 A Yes. They preferred to do it together with the seismic

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1 retrofit. That's her recommendation. Dolores -- we wanted
2 to do it before and get paid, the HVAC. She said we rather
3 -- after she's basically specifying "I spoke to legal and we
4 prefer doing it together with the seismic."

5 Q Now what is the status of the completion of the work
6 covered by the construction estimate deposit?

7 A All the HVAC units which I have pictures -- and I would
8 love to share it with the judge -- Your Honor here, all the
9 HVAC, the compressor on the outside of Sears space, it's
10 already been installed and connected. All the IT room, all
11 the electronics of their computers and everything has been
12 relocated into the Sears space. HVA -- a big portion of the
13 HVAC was done in the IT room. All the façade was completed.
14 All the signage were completed and installed. The majority
15 of the work was done. What got left to do is put the HVAC
16 condensers inside Sears' space. And the condensers, it's
17 already been paid for, installed on Sears' property in a
18 containers which I attached pictures to show that the
19 condensers are there. We were ready to do it. But they
20 asked us to do it at the later time. When I say they, I
21 mean Sears. Dolores from Sears.

22 Q Now after the commencement of Sears' Chapter 11 case,
23 did Landlord receive any substantive communications or
24 response from Sears with regard to any type of construction
25 at the property?

1 A After what date?

2 Q The commencement of the Chapter 11 case which was mid-
3 October of last year.

4 A When Sears went into bankruptcy and that was shocking
5 for us, no communication whatsoever with Sears. Everything
6 just died.

7 Q Now is it correct -- I know counsel for Transform asked
8 you about communications with Mr. Velkei. Is it correct
9 that with respect to the renovation of the project that
10 Landlord was in communications with Sears' counsel, Mr.
11 Velkei?

12 A I was continuously meeting with Steve Velkei and Alan
13 Shaw from Sears. Steve Velkei is Sears' attorney. Alan
14 Shaw is Sears' representative in regards to construction.
15 We met few times and we were talking about how we were going
16 to be proceeding with the construction of Sears.

17 Q And what did Mr. Velkei tell you in terms of further
18 communications once Sears commenced its Chapter 11 case?

19 A Again, Steve is the only contact that I had. I tried
20 getting a hold of Alan Shaw. Alan Shaw was either fired or
21 quit or laid off. So there was no -- nowhere to be found.
22 Alan Shaw was nowhere to be found, no reply whatsoever from
23 Sears. I kept on going back to Steve. And up until I would
24 say a month through later when Steve says let me Izek, I'm
25 in limbo myself. I don't know where he's going. At one

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1 time, Steve was get -- got laid off and rehired again. So
2 Steve says, Izeck, the best thing for you I recommend you get
3 yourself a bankruptcy attorney to help you here.

4 Q And is that what you did?

5 A And that's what exactly I did.

6 Q And then did you continue on behalf of the landlord to
7 try to reach out to Sears?

8 A Repeatedly.

9 Q And did you get any substantive response from Sears?

10 A Nothing. Even Steve himself, attorney for Sears, could
11 -- couldn't get a hold of no one.

12 Q With respect to the current status of the project and
13 whether or not it's dead and the questioning that you were
14 receiving, what is your view of the current status of the
15 project?

16 A Can you repeat it again, please? You were asking me a
17 question?

18 Q Yes. What is the current status of the project, the
19 renovation and rehabilitation of the property, the big
20 project, not --

21 A For the overall project?

22 Q Yes.

23 A What is the status of it? It just died out. I mean,
24 the lender pulled away. Once the lender pulled away, I have
25 no funds to basically start construction. So died out.

1 Q And why did that occur?

2 A Because there was a condition -- one -- there was a
3 condition with the lender that they want to see an agreement
4 with Sears that they will allow us to go in and do the
5 seismic retrofit. They were afraid -- they knew that Sears'
6 bankruptcy, it's an issue. They were afraid to finalize the
7 loan and start funding. And then I have no access to Sears
8 which I told them Sears are occupying 70 percent of the
9 ground floor. I have another 30 percent of the ground floor
10 that I can start construction in the 70 per -- in the 30
11 percent. And they said what happened if Sears would go in
12 bankrupt for another year and they're not going to give you
13 access to their space. So that's why I was reaching out to
14 Sears repeatedly to try to some kind of an agreement from
15 them to give my lender to assure the loan or to fund the
16 loan but to know if they're back in April of 2019 -- March
17 or April. They just send us a letter and say we are pulling
18 off, pulling away.

19 MR. KUPETZ: Thank you.

20 THE COURT: Any recross?

21 MR. WEAVER: I'll be brief, Your Honor.

22 RECROSS-EXAMINATION

23 BY MR. WEAVER:

24 Q Mr. Shomof, the evidence that you've submitted in this
25 case in support of the work that you've done is contained in

1 the three exhibits that we've been talking about, the
2 invoices, correct? That's the evidence you submitted.

3 A I submitted more than that. I don't know what you're
4 showing. I submitted bunch of invoices here that were paid
5 after -- all the way up to April of 2018. And it seems like
6 you're not talking about it.

7 Q Well, Mr. Shomof --

8 A And I'm wondering why.

9 Q Mr. Shomof, you testified before that some of the
10 invoices are from 2014, correct? That you incurred. 2014,
11 correct?

12 A I testified because you mention. I said could be, yes.

13 Q And the first invoice from you to Sears is in 2017,
14 correct?

15 A Wait a minute. I am little confused. The agreement
16 occurred with Sears on 2015.

17 Q Correct.

18 A And you're saying --

19 Q The first invoice --

20 A The amended -- hold on.

21 Q -- that you sent --

22 A Hold on.

23 Q -- in to Sears --

24 A I'm a little confused here. If you don't mind, let me
25 ask you a question. What you're saying here is work was

1 done prior to the amendment of the agreement with Sears?

2 Q By looking at the calendar, that would seem to be the
3 case. But that's not my question, Mr. Shomof. My question
4 is, you've submitted evidence that says there was -- part of
5 the backup is from 2014/2015. The first invoice that you
6 sent to Sears is dated August 16th, 2017. Correct?

7 A The first invoice?

8 Q That you sent to Sears.

9 A Was when?

10 Q August 2017. Correct?

11 A Hold on. I have it here. Before I answer, let me just
12 see it and make sure.

13 Yes. I have August 16 --

14 Q 2017. Correct, Mr. Shomof?

15 A Correct.

16 Q Okay. Now, Mr. Shomof, you also testified about having
17 possession of 30 percent of the ground floor of the
18 building, correct?

19 A Correct.

20 Q You could go tomorrow and begin construction on that 30
21 percent. Correct, Mr. Shomof?

22 A I cannot go tomorrow and start construction because I
23 have no financing.

24 Q But for financing, Mr. Shomof, you could tomorrow -- on
25 Saturday, perhaps not -- on Monday to the 30 percent and

1 begin construction. Correct, Mr. Shomof?

2 A Except for funding, yes.

3 MR. WEAVER: No further questions, Your Honor.

4 THE COURT: Okay. Any redirect on that?

5 MR. KUPETZ: No, Your Honor.

6 THE COURT: Okay. You can step down, sir.

7 THE WITNESS: Step down?

8 THE COURT: Yeah.

9 (Witness excused)

10 MR. WEAVER: Your Honor, are you prepared to hear
11 argument at this time?

12 THE COURT: Well, let me just make sure. Is there
13 any other evidence other than what's in the record and the
14 testimony that I've just heard?

15 MR. WEAVER: Nothing from Transform, Your Honor.

16 THE COURT: Okay.

17 MR. KUPETZ: Just the declarations.

18 THE COURT: Right. Those are already in evidence.
19 Okay.

20 Just going back to the evidentiary rulings at the
21 start of the hearing, I will admit the invoices in Landlord
22 2 through 4 in that evidence binder.

23 (Landlord's Exhibits 2 through 4 received in evidence)

24 THE COURT: Okay. So then I will hear brief oral
25 argument.

1 MR. WEAVER: I will try to be brief, Your Honor.

2 Again, Andrew Weaver, Cleary Gottlieb, on behalf of
3 Transform.

4 Your Honor, as you know, on May 13, 2019, the
5 debtors assumed and assigned the vast majority of its leases
6 to Transform. Since then, Transform has worked to resolve
7 any outstanding landlord objections and continues to make
8 good progress on that front. Unfortunately, we were not
9 able to reach consensual resolution as to this property,
10 Your Honor, which is why we're here today.

11 The store at issue, Your Honor, occupied the
12 portion of the building on East Olympic Boulevard in Los
13 Angeles and was subject to a sale lease back in 2004. The
14 building and the property are also the subject of certain
15 tax entitlements in favor of the landlord that are tied to
16 the redevelopment project. Now this store is a key part of
17 Transform's go forward plan, Your Honor. And it's actually
18 one of the best performing stores in the Sears portfolio.

19 There are two disputes at issue here before Your
20 Honor. And both of them are improper attempts by the
21 landlord to benefit from the Sears bankruptcy and present no
22 actual contract of fault that would be the basis of a proper
23 cure objection.

24 The first, Your Honor, the landlord seeks the
25 return of a construction estimate deposit when there is no

1 dispute to the fact that the landlord failed to meet an
2 unambiguous deadline. And more importantly, Your Honor, the
3 work covered by that deposit is not yet complete. So
4 there's nothing, in fact, for us to be deciding until that
5 work is done.

6 The second, Your Honor, the landlord invokes the
7 covenant of good faith and fair dealing in order to try and
8 collect speculative consequential damages due to the fact
9 the landlord has not moved forward with the project and is
10 at risk of losing those tax entitlements.

11 Just briefly in background, Your Honor, the
12 operative lease here is Joint Exhibit 1. It's from 2011.
13 This is before the landlord had bought the building. And
14 it's very clear in paragraph 2 that the parties acknowledge,
15 most critical, the successful operation of the business at
16 the premise that the tenant have access, use and enjoyment
17 of the building.

18 Now following the landlord's purchase of the
19 building, Your Honor, the parties entered into a 2015
20 amendment whereby the 2011 lease still controls the parties'
21 responsibilities and obligations except to the extent the
22 2015 amendment conflicts and the amendment would then, Your
23 Honor, control.

24 Now, Your Honor, we're here on a cure dispute.
25 And Your Honor, of course, is well familiar with U.S.C.

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1 365(b) which basically provides that if there's a default
2 under an unexpired lease, the trustee, or here that are in
3 possession are here Transform, must cure that default and
4 compensate for any actual pecuniary loss to such party
5 resulting from such default. Now, Your Honor, there's no
6 dispute as to the effectiveness of the leases. The leases
7 are in effect and have not expired.

8 There are two categories, Your Honor, of what we
9 call proper cure objections. The first is for CAM charges.
10 In the original cure objection filed in January, the
11 landlord sought over \$5,000 in CAM charges. Those charges
12 weren't actually due until February. In February, the
13 tenant did, in fact, pay those CAM charges with check number
14 183116. For some reason, the landlord did not cash that
15 check, Your Honor.

16 Arguably, they're fair to cash a check with way
17 unique basis for claim there but Transform is prepared, Your
18 Honor, to resubmit a check for that CAM amount if they
19 assume and assign the lease.

20 THE COURT: Okay.

21 MR. WEAVER: The second, Your Honor, is for
22 property taxes, again, just south of \$44,000. There's no
23 dispute as to that amount and it's typical of all of our
24 orders, within five business days of entry of the order,
25 Transform will provide those funds to the landlord.

1 THE COURT: Okay.

2 MR. WEAVER: So those are proper cure objections,
3 Your Honor. But what is happening -- what we're arguing
4 about today, Your Honor, is quite a big stretch from that.

5 First, let's talk about the construction estimate
6 deposit. And here, Your Honor, of course, we have to start
7 with the agreement. And this is, again, Joint Exhibit
8 number 2. And this, Your Honor, provides clearly for a list
9 of construction projects that the landlord has to perform.
10 And, Your Honor, if we look to paragraph 25 -- I won't
11 belabor the point. You just heard it read during cross.
12 But here is where the deposit is put in to 3.25 million.
13 There's a list that must be completed by April 1st. And to
14 the extent that the landlord timely completes the work and
15 it's acceptable, they will get any that's left over. But it
16 is clear that if they don't meet the deadline, the funds
17 "shall be released to the Tenant, at Tenant's election". So
18 the tenant can cause the work to be completed and seek more
19 money for the landlord if necessary.

20 But, Your Honor, that's not the only relevant
21 portion of the contract.

22 THE COURT: Well, can we just walk through this?

23 MR. WEAVER: Sure. Happily, Your Honor.

24 THE COURT: First of all, the introductory
25 paragraph in paragraph 25 sets up the three and a quarter

1 million construction estimate deposit "to partially secure
2 Landlord's design, repair, construction and completion
3 obligations under this agreement". We've already
4 established that those obligations are introduced by
5 paragraph 2 and they go through paragraph 10.

6 MR. WEAVER: Correct, Your Honor.

7 THE COURT: And it includes seismic work.

8 MR. WEAVER: It does.

9 THE COURT: But only -- but we'll go back to that
10 in a second.

11 The paragraph then says that "Tenant shall in turn
12 within a reasonable time thereafter, but in any event within
13 thirty (30) days of Landlord's written request, deposit the
14 Construction Estimate Deposit with either First American
15 Title Insurance Company or another title insurance company
16 acceptable to Tenant ('The Construction Fund Escrow') to
17 enable Landlord to be able to draw upon those funds in the
18 Construction Fund Escrow to pay for Landlord's design,
19 repair, construction and completion work as required per
20 this [Agreement] on terms acceptable to the Tenant upon
21 joint written instruction given to the escrowee".

22 The escrow wasn't done, right?

23 MR. WEAVER: Correct, Your Honor. The parties
24 agreed not to put it in the escrow.

25 THE COURT: But that agreement didn't vary

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1 anything else about the payment of the construction -- of
2 the landlord's design, repair, construction and completion
3 work for this agreement?

4 MR. WEAVER: Correct.

5 THE COURT: You're clear on that, right? There's
6 no agreement changing that paragraph in writing.

7 MR. KUPETZ: Right. Just as there was no
8 agreement with respect to the deposit not being held by a
9 third party.

10 THE COURT: Well, I mean, it says within a
11 reasonable time. I gather the parties decided there was no
12 reasonable time. And there was no request by the landlord
13 to put it in.

14 MR. KUPETZ: Correct.

15 THE COURT: Okay. So then paragraph (d) says:
16 "In the event Landlord does not complete the work
17 contemplated in Sections 3, 4, 6 and 7 by April 1, 2017".
18 Now, 3, 4, 6 and 7 deal with HVAC -- I'm actually going out
19 of order here. Low voltage service, HVAC, plumbing --

20 MR. WEAVER: Signage and façade, Your Honor.

21 THE COURT: Right.

22 MR. WEAVER: Not plumbing, technically.

23 THE COURT: Not plumbing.

24 MR. WEAVER: Technically, not plumbing.

25 THE COURT: Façade and signage. Okay. "[B]y

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1 April 1, 2007 (sic), the remainder of funds in the
2 Construction Fund Escrow shall be released to Tenant, at
3 Tenant's election, so that Tenant can cause the work to be
4 completed and Tenant shall be entitled to payment by
5 Landlord [of] any additional amounts necessary to complete
6 the work" which is consistent with paragraph 2 which says
7 the landlord shall bill all the costs.

8 So I believe it's undisputed, but I just want to
9 confirm this, that the work covered by Sections 3, 4, 6 and
10 7, none of that work was completed by April 1?

11 MR. WEAVER: I don't think it's none of the work,
12 Your Honor, but it was not completed.

13 THE COURT: Some of it. Some of it was completed.

14 MR. WEAVER: Some of it was. And --

15 THE COURT: No. But it's a different -- I didn't
16 ask that question correctly.

17 MR. WEAVER: No one objected, Your Honor.

18 THE COURT: Each one of those sections
19 contemplated a project. Is it understood that none of those
20 four projects was completed by April 1? It was worked on, I
21 understand that. But none of them was completed by April 1?

22 MR. KUPETZ: That's correct.

23 THE COURT: Okay. So the contract provides then
24 that if that work, the project, isn't done by April 1, 2007
25 (sic), "the remainder of funds shall be released to Tenant,

1 at Tenant's election". Now here, the tenant was still
2 holding it, right?

3 MR. WEAVER: Correct, Your Honor.

4 THE COURT: But it's also agreed that Tenant
5 didn't make any election so that it could cause the work to
6 be completed, right?

7 MR. WEAVER: Well, Your Honor, I don't think there
8 is anything -- there's really nothing in the record about a
9 formal election.

10 THE COURT: Right.

11 MR. WEAVER: And I think part of this, Your Honor,
12 is that this dispute isn't ripe for a cure objection. If
13 there was a dispute in the future, I believe Sears would be
14 able to put forward evidence that --

15 THE COURT: Well, I'm just walking through this.

16 MR. WEAVER: No.

17 THE COURT: I'm just trying --

18 MR. WEAVER: Understood.

19 THE COURT: -- to get the facts down.

20 MR. WEAVER: Fair. My essential --

21 THE COURT: I understand the argument. I just --

22 MR. WEAVER: Well, it's not the argument. It's a
23 fact -- I don't want to testify, Your Honor, but I
24 understand Sears did spend money, Your Honor. I just --

25 THE COURT: Well, that's my question is, "at

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1 Tenant's election, so that Tenant could cause the work to be
2 completed". So, you know, that clause seems to contemplate
3 the reasonable agreement between the parties that if the
4 landlord couldn't do it, at tenant's election, that tenant
5 would do it -- have someone do it for the tenant. I mean,
6 Sears doesn't do its own work, I'm assuming --

7 MR. WEAVER: Correct, Your Honor.

8 THE COURT: -- for all of these things.

9 Now there is a little bit in evidence just based
10 on what I heard from the testimony that there was perhaps
11 some assumption that Sears might be paying for something
12 already. That was the invoice that had the asterisk on it
13 for the 250 something thousand.

14 MR. WEAVER: Correct, Your Honor.

15 THE COURT: Is there any other evidence in the
16 record that Sears was doing some of this work or subcontract
17 -- contracting it out to someone else?

18 MR. WEAVER: Your Honor, there's not. There was
19 not evidence put in. Again, well, to answer your question,
20 no, Your Honor. I can explain if you'd like. The answer is
21 no, Your Honor.

22 THE COURT: Okay.

23 MR. KUPETZ: Your Honor, as far as the landlord
24 knows, Sears hasn't paid for anything --

25 THE COURT: Well, all right. But that's neither

1 here nor there.

2 MR. KUPETZ: There's no evidence in the record
3 that Sears paid for anything.

4 THE COURT: Except the disastrous bill. But
5 that's -- there's no evidence that that actually was the
6 case, right?

7 MR. WEAVER: Well, I'd note, Your Honor, there's
8 no evidence of anything about that bill. But --

9 THE COURT: No. That's fine. I agree with that.

10 MR. WEAVER: But nothing about the actual --
11 correct, Your Honor.

12 THE COURT: Okay. So, in any event, it seems that
13 the agreement did provide that, you know, if the landlord
14 didn't meet its deadline then Sears could basically take
15 over the work how ever it wanted to --

16 MR. WEAVER: Correct.

17 THE COURT: -- subject to the landlord being
18 liable for it.

19 Then the next sentence says: "Upon Landlord's
20 completion of the work described in Sections 3, 4, 5, 6 and
21 7 in a timely manner, and its inspection and acceptance by
22 Tenant, any remaining Construction Estimate Deposit funds
23 shall be dispersed to Landlord subject to review and
24 approval of the parties regarding the amount in question."

25 So we have some testimony from the witness that

1 most of the work was completed. And he also says that the
2 HVAC condensers -- well, it had been ready to be installed
3 but that "Sears asked to put that off". Do we have -- is
4 there anything in the record that says that work hasn't been
5 completed? I mean, there's testimony that says 75 -- I
6 mean, the declaration says 75 --

7 MR. WEAVER: Declaration itself, Your Honor, says
8 the work isn't done.

9 THE COURT: Right. That's correct, right? The
10 declaration says 50 percent, 75 percent --

11 MR. KUPETZ: Well --

12 THE COURT: -- parts of it --

13 MR. KUPETZ: -- it says the work --

14 THE COURT: It goes through -- let me turn to it.

15 MR. KUPETZ: Yeah. We should probably look --

16 MR. WEAVER: Paragraph --

17 MR. KUPETZ: -- at the declaration.

18 MR. WEAVER: -- 33 --

19 THE COURT: Right.

20 MR. WEAVER: -- I think, or so, Your Honor.

21 THE COURT: Right. So I'm looking at Mr. Shomof's
22 declaration in support of the reply.

23 MR. WEAVER: 34, Your Honor.

24 THE COURT: Paragraph 34? "The HVAC work is
25 approximately 75% complete. The remaining approximate 25%

1 of the job includes labor to install condensers". He
2 doesn't really refer -- well, I'm sorry. Let me go back.

3 And then 35 says, "Other than the HVAC work, the
4 only remaining work to be done" is plumbing. But that's not
5 -- that's a different time frame.

6 MR. WEAVER: Correct, Your Honor. Well, it's the
7 same time frame. It's just not covered by the subsection --

8 THE COURT: Right.

9 MR. WEAVER: -- (d).

10 THE COURT: Right. Exactly. So -- and obviously,
11 that work was not done -- based on the declaration and the
12 invoices, that work was not done by April 1, 2017.

13 MR. WEAVER: It's not disputed, Your Honor.

14 THE COURT: So, I guess, to me, and I'd like the
15 parties to address this, the dispute as to any right to get
16 the remainder of the tenant escrow depends on the meaning of
17 the word "timely" in that second sentence. Right? Because
18 that -- it doesn't say in the second sentence, "Upon
19 Landlord's completion of the work described in Sections 3,
20 4, 5 and 6 by April 1". It says in a "timely manner" --

21 MR. WEAVER: Correct, Your Honor.

22 THE COURT: -- "and its inspection and acceptance
23 by Tenant". Now you're saying that "timely" must refer back
24 to April 1.

25 MR. WEAVER: I don't know how it wouldn't, Your

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1 Honor. In addition to the acceptance by the landlord -- by
2 the tenant. I'm sorry, Your Honor.

3 THE COURT: Right.

4 MR. KUPETZ: And, Your Honor, of course, the
5 landlord would say when we're in ongoing discussions with
6 Sears and among other -- prior to the bankruptcy and among
7 other things, they ask us to delay some of the work and
8 they're aware that we're doing the work and saying we're
9 going to get reimbursed, that "timely" was certainly after
10 April 1 is understood to still be outstanding 'cause they'd
11 finish the work if they had access to the premises right
12 now. But Sears was nonresponsive.

13 MR. WEAVER: Your Honor, if I --

14 THE COURT: Well, so I think that frames the
15 issue. So that's what I'd like you to address. Those
16 arguments which you probably weren't going to address but I
17 wanted to go through the --

18 MR. WEAVER: I'm going to cut right to the chase.

19 THE COURT: -- facts first --

20 MR. WEAVER: Fair enough. No problem, Your Honor.

21 THE COURT: -- to get to that area of
22 disagreement --

23 MR. WEAVER: Right.

24 THE COURT: -- on the return of the money in the
25 account.

1 MR. WEAVER: Right. Well, Your Honor, if I may, I
2 think -- first of all, the only evidence we have to talk
3 about, really, the true evidence, is this one e-mail. I
4 want to talk about that e-mail, about what the request was.
5 I think it all relates, Your Honor, because when we go
6 through that e-mail, there was a discussion about doing --
7 the deadline had passed. April 1st had passed and they had
8 not met their deadline. But the tenant made a decision
9 under the assumption that the seismic work was about to get
10 started that they should do it together. And the tenant can
11 keep that decision and optionality, Your Honor. And it's
12 provided for specifically in the agreement. This is
13 something I think we have to look at. We can't look at this
14 provision in isolation. We have to also look on the page
15 previous on paragraph 23 of the amendment, Your Honor. And
16 that is the extension of time express waiver provision.

17 And that provides: "The parties hereto may, only
18 by an instrument in writing, extend the time for or waive
19 the performance of any obligation of the parties hereto."

20 And I think the important language is: "Failure
21 on the part of either of the parties to enforce any rights
22 which they may have against the other for the other's breach
23 of this [Agreement] shall not constitute a waiver of the
24 said right, nor shall any written waiver given by a party
25 pursuant [t]hereto be deemed to constitute a waiver of any

1 other right not expressly waived therein."

2 Your Honor, that language has to be read with this
3 provision.

4 Now, as a practical matter, Your Honor, as a
5 tenant and a landlord, do they have to work these things
6 out? Does the tenant want this work to happen? Absolutely,
7 Your Honor. But we're here about a cure objection, about a
8 default under the agreement. And when you take that
9 language with the provision, I think it, frankly, takes away
10 a lot of the factual discussion that we have to have. It's
11 not in dispute that the work wasn't done. It is in --
12 they've raised a course of conduct, Your Honor. But the
13 California case law they cite is clear, course of conduct
14 cannot contradict the express terms and they can't get
15 around paragraph 23, Your Honor. They just can't.

16 THE COURT: Well, let me lay something out to you.

17 MR. WEAVER: Sure, Your Honor.

18 THE COURT: I understand that there's a deadline
19 in the first sentence. And it talks about the funds being
20 released to the tenant at tenant's election. There's no
21 formal election. But the tenant had the funds already.

22 MR. WEAVER: They wouldn't have to elect because
23 it wasn't with escrow, Your Honor.

24 THE COURT: Right. So the tenant then, it appears
25 to me, did, in fact, cause the work to be completed. It

1 used --

2 MR. WEAVER: It -- I was coming to that point,
3 Your Honor.

4 THE COURT: It used the landlord's subcontractors
5 to do that through the landlord and perhaps argue --
6 although the record is -- really doesn't support this --
7 perhaps it spent of its own money, too.

8 I believe what you're saying is that that's fine.
9 That's why it did what it did. And then -- but that doesn't
10 change the operation of the second sentence which says that
11 you got to complete it in a timely manner as a condition to
12 getting the money back.

13 MR. WEAVER: If you rely upon that provision, yes,
14 Your Honor.

15 THE COURT: Right.

16 MR. WEAVER: As you --

17 THE COURT: Well, that's the provision that says
18 the money comes back.

19 MR. WEAVER: Correct, Your Honor. But as you just
20 outlined --

21 THE COURT: 'Cause there was no formal election.

22 MR. WEAVER: Correct. But as you just outlined,
23 Your Honor, they had the option to use the landlord work.
24 They had that option. And that wouldn't be -- they wouldn't
25 be entitled to return the funds if they elected to go that

1 route. The reason you have paragraph 23, Your Honor, is so
2 the tenant can make its decision that things are most
3 economical. And it would be one thing, Your Honor, if they
4 had any backup for this one-page invoice that they've
5 submitted. Then maybe we could even talk about it. But we
6 have nothing. Your Honor, we literally have nothing other
7 than one page. And --

8 THE COURT: Well, can we go to that?

9 MR. WEAVER: We can. And their deadline, Your
10 Honor, was May 1st.

11 THE COURT: I guess this is -- I'm a little
12 confused about this. Is the -- this is as much a question
13 for you as counsel for Transform.

14 Is the claim by the landlord for, you know, in
15 excess of a million dollars based on this deposit? Is it
16 premised on work it did or that it paid for that hasn't yet
17 been paid? That's one.

18 Or is it simply for the return of the remaining
19 amount of the deposit because it didn't actually have to pay
20 for the work beyond what it's already been paid for and
21 therefore, it's entitled to a refund?

22 Which one of those two is it?

23 MR. KUPETZ: It's both.

24 THE COURT: It's both.

25 MR. KUPETZ: There's 322 --

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1 THE COURT: You can stand up. I know in
2 California they do it differently but in New York --

3 MR. KUPETZ: I'm sorry.

4 THE COURT: -- they stand up.

5 MR. KUPETZ: I'm sorry, Your Honor. Should I go
6 to the --

7 THE COURT: No, no. The microphone will pick you
8 up. It's just that they (indiscernible). Okay.

9 MR. KUPETZ: The 322,000 is for work that's been
10 done and hasn't been paid for.

11 THE COURT: Okay.

12 MR. KUPETZ: There would then be additional work
13 that the landlord is prepared to do to finish completely
14 that the landlord estimates at 375,000. Completely. And
15 that would leave approximately 727,000. The landlord's
16 view, as set forth in the declaration, is that the deposit
17 was always set up with an intended buffer --

18 THE COURT: Right.

19 MR. KUPETZ: -- in there.

20 THE COURT: Okay. So do you agree with that that
21 there's an amount that it's claimed 322,000 that's been done
22 and not paid -- for work that's been done and not paid for
23 and the rest is just for the return of the
24 overcollateralization?

25 MR. WEAVER: I agree, Your Honor, that their --

1 THE COURT: That's their claim.

2 MR. WEAVER: -- their objection was --

3 THE COURT: All right.

4 MR. WEAVER: -- 322 for work done, return of the
5 rest.

6 THE COURT: So as far as the 322 --

7 MR. WEAVER: Yes.

8 THE COURT: -- I believe you're contending that
9 the bill just doesn't support -- there's no backup for that
10 bill except for a relatively small amount?

11 MR. WEAVER: Well, I have -- well, I have two
12 arguments. As a fundamental evidentiary matter, yes, Your
13 Honor. When they submitted their cure objection on May 1st,
14 they submitted a one-page invoice with nothing else.

15 THE COURT: Right.

16 MR. WEAVER: Today we're now a few months later.
17 There's still nothing else for that invoice. Nothing. So
18 that's what we have.

19 But it's a technical reading in the agreement,
20 Your Honor, but I think it's the correct reading, which is
21 to the extent the tenant decided to use -- to do this, how
22 did the landlord do this work. It's no longer operating
23 under the provision of Section (d). If they want to claim
24 they've done work and they haven't been paid for it, Your
25 Honor, it's not a breach of this provision, it's not a

1 breach of this agreement. It's -- the tenant has elected to
2 complete the work itself. And it may be using them. But
3 it's not a breach of --

4 THE COURT: But it would have to pay for it.

5 MR. WEAVER: Correct, Your Honor. And they could
6 bring a breach action. But it's not a cure --

7 THE COURT: All right.

8 MR. WEAVER: -- under this lease, Your Honor.

9 That's what we're arguing.

10 THE COURT: Okay.

11 MR. WEAVER: This is not a proper --

12 THE COURT: All right.

13 MR. WEAVER: -- cure objection.

14 THE COURT: I understand that point.

15 MR. WEAVER: Okay.

16 THE COURT: All right.

17 MR. WEAVER: If there's nothing else on that, Your
18 Honor, I'll move on.

19 Again, though, emphasize -- well, I don't want to
20 move on, Your Honor. I'm sorry. I feel like I do have to
21 address it.

22 You know, the course of conduct that they want to
23 rely upon here, Your Honor, again, we really -- in the
24 record, we have one --

25 THE COURT: Can --I'm sorry to interrupt you.

1 MR. WEAVER: No. Of course.

2 THE COURT: But it actually -- and I don't want to
3 get you in trouble with your client but I think this -- and
4 I actually think what you said was the correct legal
5 response. But --

6 MR. WEAVER: Thank you, Your Honor.

7 THE COURT: -- I just want to point out to the
8 landlord that if the 322,000 were a cure objection, it
9 wouldn't be sustained on this record. What counsel just
10 said is, it's not a cure objection. It's a right either
11 under quantum meruit or based on the parties' actual
12 dealings with each other as to the work that was done post-
13 April 1. So it preserves the right to get paid for that
14 which if it were a cure objection, you probably have --
15 well, you haven't sustained unless you can show me the
16 backup. But go ahead.

17 MR. WEAVER: Well, in that case, Your Honor, I'm
18 going to not deal with course of conduct unless --

19 THE COURT: Right.

20 MR. WEAVER: -- you want to hear more about it
21 later, Your Honor. I -- for efficiency purposes, I'm happy
22 to move on to the seismic --

23 THE COURT: Well, I mean -- why don't you cover
24 it?

25 MR. WEAVER: Okay.

1 THE COURT: I mean, the parties have addressed it
2 in their papers. So --

3 MR. WEAVER: They have, Your Honor. I just think
4 that it's really important that the language of paragraph 23
5 -- because course of conduct -- first of all, I don't think
6 we have course of conduct here. But even if there was a
7 course of conduct, you cannot go contrary to an express
8 provision. You can't. California law is clear on that.
9 The cases they cite are clear on that, Your Honor. You
10 can't go against an express provision. 23 is express.

11 THE COURT: Which is the no-waiver provision.

12 MR. WEAVER: No-waiver provision. The fact that
13 we don't enforce our right on April 2nd doesn't mean we've
14 waived it. That's -- I should say the tenant's right, Your
15 Honor.

16 THE COURT: It could go to explain the word
17 "timely".

18 MR. WEAVER: It could, Your Honor.

19 THE COURT: But --

20 MR. WEAVER: It could, Your Honor. And if we want
21 to limit it to that, Your Honor, I'm very happy to look at
22 the e-mail from May 11th.

23 THE COURT: Right.

24 MR. WEAVER: This is Landlord Exhibit 5. And this
25 is the e-mail from Dolores -- and no one can pronounce her

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1 last name, Your Honor so we keep calling her Dolores. So I
2 apologize for that.

3 THE COURT: Okay.

4 MR. WEAVER: And in the discussion -- and again,
5 this is after the deadline has passed. She acknowledges the
6 deadline has passed and says, in light of that, what we'd
7 like you to do, we're making the decision, we want you to do
8 this with the seismic work because that's more efficient for
9 us. And there's an assumption belongs to that. The
10 assumption is the seismic work's about to get started.
11 We're going to pull the permits that year; we're going to
12 start in January 2018.

13 The record's clear, Your Honor. They didn't pull
14 the permits of this year. So the idea of "timely", Your
15 Honor, the course of conduct there is irrelevant. There was
16 a discussion about doing the work together. But that --
17 even deciding to make that offer doesn't waive their rights
18 under the provision.

19 THE COURT: And, in fact, it really wasn't done
20 together, right?

21 MR. WEAVER: It hasn't been done. The seismic
22 work hasn't been done at all.

23 THE COURT: No, no. The HVAC work was done
24 separately. It wasn't timed to the seismic work.

25 MR. WEAVER: Apparently. Correct. Correct, Your

1 Honor. Correct, Your Honor.

2 And then the other e-mails, Your Honor, just to
3 touch on them briefly, they're frankly all about having
4 meetings in Los Angeles amongst landlord and tenant. If you
5 look at Landlord's Exhibit 6, there's this discussion we've
6 talked about. There's talk about landscaping and building
7 security, pulling aside the permits. Exhibit 7, Your Honor,
8 frankly, is the same communication that was in Exhibit 12 so
9 they've repeated themselves.

10 Exhibit 14 has to do more about meetings. Exhibit
11 -- I'm sorry -- Exhibit 8. Exhibit 9, more about meetings.

12 THE COURT: I'm sorry. When you're referring to
13 these exhibits, these are the exhibits in the witness
14 binder?

15 MR. WEAVER: No, no. The landlord exhibits. I'm
16 sorry, Your Honor. The landlord exhibits. I can --

17 THE COURT: Fine.

18 MR. WEAVER: We didn't catch them all.

19 But the point is, Your Honor, the discussion in
20 the e-mails that's relevant here is this discussion about
21 doing the seismic work together. That's the only discussion
22 that's relevant. And I would argue, Your Honor, that the
23 only course of conduct that's been demonstrated today is
24 that the landlord took forever to bill the tenant. They
25 submit -- they want to argue because the tenant paid them

1 after the deadline that that somehow indicates their
2 acquiescence. But they didn't even bill them until after
3 the deadline, Your Honor. And we looked at the invoices
4 today. Almost all of the invoices are before the deadline.
5 But the ultimate invoices to Sears came after the deadline.
6 So that's the course of conduct. They bill late and they
7 were paid.

8 THE COURT: Well, bill late for services when?

9 MR. WEAVER: Before April 1st except for the 14
10 invoices that we've identified. And many of them are from
11 the month of April 2017, Your Honor. That's what the record
12 provides.

13 (Pause)

14 THE COURT: Okay.

15 MR. WEAVER: Then, Your Honor, turning then to the
16 seismic retrofit issue, Your Honor, here we look to first
17 Joint Exhibit number 1, which is the 2011 lease. So at
18 paragraph 2(a)(3), Your Honor, it says that, "Without
19 tenant's prior approval, which may be withheld for any or no
20 reason in its sole discretion, Landlord shall not construct
21 or install any improvements or make any changes to Tenant's
22 Control Area or interfere with or obstruct Tenant's use
23 thereof in any manner whatsoever."

24 Now the point of that section, Your Honor, isn't
25 to argue that Sears can simply put their head in the sand

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1 and say you can't do any work. But that's the starting
2 point. That is where we start from. And from there, we
3 then move to the 2015 amendment, Your Honor.

4 So if we go to Joint Exhibit 2, which is the 2015
5 amendment, Your Honor, you already identified yourself that
6 paragraph 2 lays out at the beginning that the landlord
7 shall be responsible for the costs and expense related to
8 these projects. And if we go to paragraph 8, Your Honor,
9 which is the seismic work paragraph, again, it makes clear
10 the landlord's responsible for all of the seismic repairs.
11 They're to pull the permits within 12 months of when LA
12 approves. They're then also to complete the work within 12
13 months after pulling the permits.

14 It also provides in that section, Your Honor, that
15 "The plans and specifications, schedule, authorized hour of
16 construction activity and remediation plan for said seismic
17 work shall be pre-approved by Tenant pursuant to Demolition
18 and Construction Protocol attached hereto as Exhibit C, and
19 conducted in a manner that creates the minimal possible
20 visual and noise inconvenience to Tenant and its customers."

21 So that's the work, Your Honor, that needs to be
22 done and how it needs to be done.

23 So to look at Exhibit C, Your Honor, to this
24 agreement which is --

25 THE COURT: The construction protocol.

1 MR. WEAVER: Yeah. And that is found -- if you
2 look at the ECF pages at the top, I think it's page 48 of
3 135.

4 THE COURT: Right.

5 MR. WEAVER: And here, Your Honor, we're dealing
6 with paragraph 2(b) which is the non-hazardous materials.

7 THE COURT: Right.

8 MR. WEAVER: So it says, "Landlord shall provide
9 two weeks notice." And it states that such notice "shall
10 include the scope of work contemplated, a detailed set of
11 plans and specifications for the same together with a
12 schedule, authorized hours of construction activity and
13 remediation plan for the same". And this provides that if
14 the tenant doesn't respond in 10 days, that's considered to
15 be approval of those plans.

16 So, Your Honor, the landlord simply did not meet
17 their obligation under the agreement. So there's nothing to
18 be arguing that there was any breach under the 2015
19 amendment, Your Honor. The thing they point to is Joint
20 Exhibit number 3 which is September 25th letter. And, Your
21 Honor, that letter does not have any detailed plans, no
22 floor plans, no specifications. The testimony's been that
23 it was a negotiating document, Your Honor. The idea was
24 there'd be a back-and-forth. The only timeline included in
25 that was that Sears would shut down for six months. And,

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1 Your Honor, I could point to all the provisions in the two
2 contracts that make very clear that it was important that
3 the store continue to operate. And the idea that Sears
4 would shut down particularly on the eve of bankruptcy for
5 six months, there's no offer of compensation for that, Your
6 Honor, frankly, is absurd. It may have been a condition of
7 the construction financing they were looking for but that's
8 not on the tenant, Your Honor. The landlord assumed all the
9 risks for the costs for this project.

10 And importantly, Your Honor, the person to whom
11 that letter was addressed responded. And this is Joint
12 Exhibit 11, Your Honor. And I don't need to read the entire
13 paragraph to you again, Your Honor, but it's clear in that
14 response not only that this was not what the parties had
15 been talking about but that there were concerns on the side
16 of the tenant about missing deadlines and that they stated
17 just two months prior that they may not go forward with the
18 project, Your Honor. That was the response.

19 And the response further was an offer from counsel
20 to meet with the lawyer. Now we heard a lot on the stand
21 today about verbal conversations, Your Honor. But to the
22 extent anyone thinks something in writing is inconsistent
23 with the facts, usually they respond in writing to keep the
24 record clear. And there's no written response to counsel's
25 communication, Your Honor. There's none. And I think that

1 speaks volumes, Your Honor.

2 So they want to invoke, Your Honor, the covenant
3 of good faith and fair dealing. They don't want us to point
4 to any provision of the agreement that was in default. They
5 want to apply an obligation onto the tenant. But the law,
6 Your Honor, again, here in California and everywhere is
7 clear. You cannot invoke the covenant of good faith and
8 fair dealing to contradict express terms of the contract.
9 And I think, Your Honor, just the case that we cite, the
10 Storek case -- Storek & Storek case in our papers, cites to
11 the California Supreme Court and says very clearly the scope
12 of conduct prohibited by the covenant of good faith is
13 circumscribed by the purpose and express terms of the
14 contract.

15 We're aware of no reported case in which a Court
16 has held that the covenant of good faith may be read to
17 prohibit a party from doing that which is expressly
18 permitted by an agreement.

19 On the contrary, the general matter implied terms
20 should have to be read "shall never be read to vary express
21 terms". What are the express terms here, Your Honor? The
22 tenant has complete autonomy over its space. There's no
23 question about that. And the landlord has an obligation to
24 develop the plan -- a plan -- that's minimally invasive.
25 That's on the landlord, Your Honor. And there's a provision

1 with the agreement that says how you do that. It's the
2 construction protocol. It's cited within Section 8.

3 The landlord's one and only proposal, Your Honor,
4 is the September letter which was an ask that Sears shut
5 down for six months. Now even assuming that the landlord's
6 argument to be true that there was no formal response on
7 Sear's letterhead, Your Honor -- and I think the Sears'
8 counsel's response speaks volumes -- they didn't get
9 anywhere near to meet their obligations under the protocol.
10 And if they can't meet their obligations, they cannot then
11 somehow create an obligation not even in the contract for
12 the tenant. Yes, Your Honor, Sears went into bankruptcy in
13 October. No one in this room is more familiar with how busy
14 and crazy that was, Your Honor. But that does not give them
15 a hook to try to argue that their failure to do anything
16 under the contract provides a burden on the tenant.

17 And more importantly, Your Honor, the idea that
18 they were ready, willing and able to do this, the contract,
19 the amendment, was signed at the end of 2015. The testimony
20 in the deposition record, Your Honor, is that the landlord
21 didn't even begin to look for construction financing until
22 June of 2018. They didn't pull the permits until February
23 2019. Your Honor, if this project doesn't go forward, it's
24 not because they didn't get a letter back on Sears'
25 letterhead that says we're not shutting for six months, Your

1 Honor.

2 The landlord can't use its lack of prosecuting the
3 program as a way to try to recover these costs because Sears
4 went into bankruptcy.

5 And I think overarching all of this, Your Honor,
6 is the idea that these are just speculative damages. They
7 are. They're speculative. We've talked about the
8 construction advance. And Your Honor's already said that --
9 I think made clear your view, but I would just state that
10 how can we argue about the return of a construction estimate
11 deposit and the work's not done? We can't. There's -- we
12 can't. Who knows what may happen? Maybe they do some more
13 work and there's a pipe burst and there's more dam -- we
14 don't know, Your Honor. We can't return money until the
15 work is done. And they admit the work is not done. And as
16 you've already held, on the basis of the record, they
17 certainly have not supported their claim for \$322,000.

18 But as it relates to the seismic retrofit, Your
19 Honor, the permits are active; they're valid. They're
20 active today. You heard testimony from the landlord that
21 they have control over 30 percent of the ground floor. You
22 also heard testimony today that all they have to do is begin
23 construction and call an inspector. That's all. That was
24 in the deposition and it was repeated today. That's what
25 they have to do to keep those entitlements going. So if

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1 Your Honor, for example, will rule today in their favor and
2 provide for a ruling, and Transform then took the lease and
3 made that payment, nothing would stop them, Your Honor, from
4 beginning construction on the 30 percent that they own the
5 next day. And then those entitlements would still be valid.

6 THE COURT: Is there -- I saw easements from the
7 landlord to Sears in the lease. Is there any issue as to
8 access to the 30 percent to start construction is more of
9 the question for -- no. For counsel.

10 MR. WEAVER: Certainly not in the record, Your
11 Honor. I don't believe there is. Actually, I did ask the
12 question on the stand, Your Honor, and the only issue was
13 financing. That was the witness' testimony.

14 THE COURT: That's true.

15 MR. WEAVER: So, Your Honor, I don't see how you
16 can satisfy, I think, legal arguments which are very -- I
17 think, Your Honor, are very strong and I hope you agree.
18 But how in the world -- and particularly, Your Honor, their
19 deadline for cure objection was May 1st. That was the
20 deadline of their cure objection. And there's nothing in
21 their cure objection about the fact the project is dead.
22 They've lost a --

23 THE COURT: Well, they reserved their rights to
24 supplement it.

25 MR. WEAVER: They did, Your Honor.

1 THE COURT: And they supplemented it within two
2 days before the final deadline. So --

3 MR. WEAVER: Correct, Your Honor. Fair enough.

4 So, Your Honor, happy to answer any more questions
5 you may have. But that is the argument that I'm trying to
6 present to Your Honor this morning.

7 THE COURT: Okay.

8 MR. SHOMOF: Can I stand?

9 MR. KUPETZ: Your Honor --

10 THE COURT: No. Only the lawyers get to speak.

11 MR. SHOMOF: No? Okay.

12 THE COURT: You could whisper something to him now
13 if you want him to think about something.

14 (Pause)

15 MR. KUPETZ: Your Honor, I would indicate that
16 while counsel said they had tried to resolve consensually
17 cure objections, we just didn't have any discussions in
18 terms of whether it was with Sears or Transform, there were
19 no substantive discussions once the filing occurred although
20 we reached out.

21 With respect to the construction estimate deposit,
22 Transform incorrectly contends that the landlord has
23 forfeited its right to that deposit. The landlord deposited
24 \$3,250,000 with Sears. The understanding was and is that
25 that was strictly to be used for reimbursement of specified

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1 tenant improvement construction expenses. So the evidence
2 shows --

3 THE COURT: But where is that in the agreement?

4 MR. KUPETZ: Well, even when you look at the
5 agreement, Your Honor, there's nothing that says --

6 (Pause)

7 MR. KUPETZ: Even in Section 25(d), Your Honor, it
8 doesn't say what happens to the deposit if the work isn't
9 completed. It doesn't say that it's forfeited to Sears.

10 THE COURT: Well, it says that the -- the second
11 sentence says that any remaining construction estimate
12 deposit shall be dispersed to the landlord if the landlord
13 has done it. But --

14 MR. KUPETZ: Right. I'm saying if it's done, they
15 have to disburse it to the landlord.

16 THE COURT: Well --

17 MR. KUPETZ: But it doesn't say that if it's not
18 done, Sears -- and Sears doesn't spend the money to do the
19 work, that they somehow get to keep the money and have some
20 kind of windfall.

21 THE COURT: Well, they have the money.

22 MR. KUPETZ: Right. Of course, the agreement
23 didn't contemplate that specifically and the parties
24 modified that approach. But it was --

25 THE COURT: I mean, I can understand an argument,

1 although this wouldn't be a cure argument, that keeping the
2 deposit and not using it to complete the construction might
3 be an unenforceable penalty, something like that, or
4 unenforceable liquidated damages. But that's not really a
5 cure issue. I mean, that's how you'd normally deal with
6 forfeit.

7 MR. KUPETZ: Right. But the agreement granted, in
8 terms of the way it's written, has some ambiguities is what
9 we would say. But it doesn't -- it's not saying that this
10 deposit is forfeited --

11 THE COURT: Well --

12 MR. KUPETZ: -- if this work isn't done.
13 Certainly, as set forth in the witness' direct testimony,
14 the declaration, the understanding certainly of the landlord
15 was that these funds were to be strictly used for the
16 specified work.

17 THE COURT: Well, it says that this is -- 25, the
18 introductory paragraph, describes the 3.25 million deposit
19 as "to partially secure Landlord's design, repair,
20 construction and completion obligations under this
21 Amendment" which includes not only the four paragraphs but
22 the whole thing including the seismic. So --

23 MR. KUPETZ: Well --

24 THE COURT: You know, it's securing it, all that
25 work. That work -- it's clear the seismic work hasn't been

1 done yet. So --

2 MR. KUPETZ: Right. But --

3 THE COURT: -- to say that he would go back
4 because it's a forfeiture seems to be contradictory to its
5 purpose which is to secure the deposit.

6 MR. KUPETZ: I don't think that's really what it
7 says because --

8 THE COURT: I just read it to you.

9 MR. KUPETZ: No. But --

10 THE COURT: That's exactly what it says. That's a
11 quote. That's the purpose of the deposit.

12 MR. KUPETZ: But then --

13 THE COURT: It's a separate point you're making --

14 MR. KUPETZ: Okay.

15 THE COURT: -- I think, which is that it's unfair
16 for the landlord to say that because their work in 3, 4, 5,
17 6 and 7 isn't timely done that they get to keep the deposit
18 and they can do with it whatever they want to. But that's
19 not a cure issue. That's potentially a liquidated damages
20 issue. But clearly, it seems to me if they apply it to the
21 work that should have been done and hasn't been done which
22 includes 8, then there's no forfeiture. It secured all that
23 work.

24 MR. KUPETZ: But 8 isn't covered by 25(d).

25 THE COURT: No. I know. But you're saying that

1 the landlord has a claim to the deposit. And we're not
2 talking about the 322,000. We're talking about a claim to
3 the deposit. And that's just not -- anyway, why would the
4 landlord be entitled to it unless there was some sort of
5 agreement that the deadline was waived.

6 MR. KUPETZ: Well, and that's certainly the
7 landlord's --

8 THE COURT: I understand that.

9 MR. KUPETZ: And I can discuss that --

10 THE COURT: That's a separate point.

11 MR. KUPETZ: That's --

12 THE COURT: But when you're talking about
13 forfeiture, it's a different issue.

14 MR. KUPETZ: Yeah. But that is the landlord's
15 position that --

16 THE COURT: I understand.

17 MR. KUPETZ: -- the deadline was waived.

18 THE COURT: Right.

19 MR. KUPETZ: And it's the landlord's position that
20 upon completion of the work, which the landlord is prepared
21 to do, the remainder of the deposit is to be returned to the
22 landlord.

23 THE COURT: Right.

24 MR. KUPETZ: Your Honor, in the direct testimony
25 of Mr. Shomof, it's stated that prior to the commencement of

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1 the case, Sears communicated with the landlord on a regular
2 and continual basis. It wasn't just by e-mail. It's
3 e-mail, telephone, in-person meetings -- to coordinate and
4 request that the landlord do construction work at the
5 premises for which the landlord was and/or would be
6 reimbursed from this deposit. This occurred after the April
7 1 deadline. The testimony shows that, and states, in
8 reliance on tenant's representations and the requests and
9 the conduct and the performance, the landlord performed this
10 work at the premises --

11 THE COURT: So you're saying it is a cure
12 objection knowing what I've already told you that you don't
13 have proof of the 322,000?

14 MR. KUPETZ: No. Well, we're saying we have a
15 legitimate claim to get paid.

16 THE COURT: But you haven't given me a backup for
17 the amount.

18 MR. KUPETZ: Well, they're all -- there isn't
19 evidence that that amount wasn't incurred. I mean, the
20 amount has been stated the landlord --

21 THE COURT: That's not how you prove a claim.

22 MR. KUPETZ: Well, the landlord's testified that
23 this was incurred.

24 THE COURT: He hasn't reviewed any of the
25 underlying documents. He doesn't know the invoices. He

1 didn't attach the invoices to his declaration.

2 MR. KUPETZ: Well, you're referring to the 322?

3 THE COURT: Yeah.

4 MR. KUPETZ: He attached the invoice presented to
5 Sears.

6 THE COURT: But nothing to support it. It may
7 well be that he could do that but he hasn't as far as a cure
8 claim to me today.

9 MR. KUPETZ: No. His testimony talks about the
10 point person at Sears, as counsel's referred to, or Dolores.
11 Obviously, her e-mails -- they went back and forth. They
12 continued to be involved. She was going to legal. She did
13 talk to legal. In our view, waived any deadline. That was
14 the understanding.

15 THE COURT: How is that a waiver, that e-mail?

16 MR. KUPETZ: Well, it's not -- we're not trying to
17 rely just on that e-mail but that e-mail and other conduct
18 including other e-mails that showed that work was being done
19 and that she, on behalf of Sears, was in approval of that
20 work and ongoing work. Shows a course of performance that,
21 under California law, does supplement and does qualify and
22 can modify contrary terms in a contract. And that's what
23 occurred here.

24 In the legal discussion, they included it, pages 5
25 through 7 of the reply, if you go through that, there's the

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1 California Civil Code provision that talks about it and then
2 cites to the commercial code history. And in there, it
3 talks -- in the quoted language that we have from the
4 California Court of Appeals decision is the lengthy block
5 quote that we put at page 6. And there's a reference in the
6 last paragraph on that page that "Course of performance is
7 relevant in ascertaining the meaning of the parties'
8 Agreement and it may supplement or qualify the terms of the
9 Agreement or show a waiver or modification of any term
10 inconsistent with the course of performance." And that's
11 what --

12 THE COURT: But the parties have already stated in
13 their Agreement that there's a no-waiver -- spelled out how
14 you waive. It just doesn't -- I don't see that. I don't
15 see the basis of that point.

16 MR. KUPETZ: Well, Your Honor, I won't belabor it
17 then but in our papers, and in our view, the parties did
18 modify by course of performance --

19 THE COURT: Let me just go to the -- this
20 argument.

21 (Pause)

22 THE COURT: The e-mail from Dolores acknowledges
23 or states the fact that the deadline was not met. Right?

24 MR. KUPETZ: Right. And she continues on.

25 THE COURT: Right. So wouldn't that, at that

1 point -- wouldn't that point which that's obvious and she
2 states it, be the point where there's a dispute as to what
3 happens next?

4 MR. KUPETZ: No. Because they were in agreement
5 as to what would happen next.

6 THE COURT: But there's a dispute as to how to go
7 ahead because --

8 MR. KUPETZ: Not with respect to the construction
9 estimate deposit, where it goes. With respect to the
10 seismic work and other work, they didn't come to an
11 agreement. But with --

12 THE COURT: But she just said you missed the
13 deadline.

14 MR. KUPETZ: Right. But we -- but we're going to
15 continue to work with you. And there's other e-mails.
16 Here's what -- that works looks good. Keep doing it. And
17 they came out and met in person after that, Dolores and
18 another representative of Sears both in June and November of
19 that year and, you know, continued to make payments
20 following that time and to request that work be done on
21 these elements. It was -- they only didn't finish up the
22 ultimate work on the construction deposit portion when two
23 things happened. First, Sears had asked to delay the HVAC.
24 And they did delay the HVAC --

25 THE COURT: But --

1 MR. KUPETZ: -- work inside the store. They --

2 THE COURT: But she expresses that you've missed
3 the deadline.

4 MR. KUPETZ: Right, but it's --

5 THE COURT: And now she's --

6 MR. KUPETZ: -- but she then says, "It's fine with
7 us" --

8 THE COURT: I know, but --

9 MR. KUPETZ: -- "to go forward and" --

10 THE COURT: But that -- my understanding, at
11 least, of -- any application of this doctrine is precluded
12 if the parties are already in a dispute, because, in
13 essence, that would force a party who wants to make the best
14 of a bad situation to somehow have acquiesced in -- you
15 don't want to be deemed to have acquiesced in the breach.
16 It's antithetical to cover, in other words.

17 MR. KUPETZ: Well, I hear what Your Honor is
18 saying, but I don't believe that's the way the parties were
19 dealing with it. She never communicated to them that they
20 were in a dispute.

21 THE COURT: Well, she just said you -- but she
22 says in that email, you missed the deadline.

23 MR. KUPETZ: Right. But that's fine. We're going
24 to continue to work this way.

25 THE COURT: Well, but that's what people do when

1 there's cover. You know, it doesn't mean that you've waived
2 a breach. You could -- particularly with an agreement like
3 this that, in essence, gives the tenant a backup, which is
4 to direct the work yourself. Why isn't that what she was
5 doing?

6 MR. KUPETZ: Well, that wasn't how the landlord
7 understood it, but maybe that --

8 THE COURT: Well --

9 MR. KUPETZ: It could be what she was doing.

10 THE COURT: All right. So --

11 MR. KUPETZ: The landlord understood we're not in
12 dispute. We're continuing to work on this and --

13 THE COURT: Well, I --

14 MR. KUPETZ: -- that basically the terms had been
15 modified voluntarily by the parties.

16 THE COURT: Okay.

17 MR. KUPETZ: So it sounds like Your Honor has
18 heard as much as you're -- besides the papers, in
19 considering --

20 THE COURT: Well, I mean, the papers laid this
21 out.

22 MR. KUPETZ: Yeah. So I think you've --

23 THE COURT: I think it's clear under California
24 law that you can use course of dealing to explain or
25 construe a provision of an agreement beyond parol evidence.

1 MR. KUPETZ: Right, and --

2 THE COURT: And I've -- we've discussed that in
3 terms of the word timely. But I think that the California
4 courts are actually quite careful in limiting course of
5 dealing where there are contradictory provisions in the
6 agreement, and where there's -- where those provisions have
7 been breached. At that point, I just -- you know, to read
8 it to say that if the parties continue to try to work out of
9 a bad situation, the one party has waved its rights under
10 the agreement just doesn't -- I think you need more than
11 that.

12 And it -- let's go to the fundamental point, which
13 is the proposal that she made was to tie the HVAC work to
14 the seismic work, so they're all done together. That
15 actually wasn't done.

16 MR. KUPETZ: Well, it was, in part, because part
17 of the HVAC work didn't affect -- she was really concerned
18 with in-store interference. Part of the HVAC work is on the
19 roof -- that rooftop, and that's been done. That doesn't
20 affect the store. That wasn't what she was concerned about.
21 She was concerned about in-store access and interference.
22 And that work hasn't been completed. That's the remaining
23 portion --

24 THE COURT: Right.

25 MR. KUPETZ: -- because Sears hasn't allowed

1 access as of this point.

2 THE COURT: But the agreement, if you're saying
3 there was a waiver, was to do it in connection with the
4 seismic work, so you wouldn't have to do it twice, right?

5 And --

6 MR. KUPETZ: Well, it was beyond that --

7 THE COURT: -- your argument is, "Well, Sears is
8 preventing us from finishing the HVAC work, and then we'll
9 do the seismic work."

10 MR. KUPETZ: But the agreement, as the landlord
11 understood it, covered other work that was ongoing. It
12 wasn't just that work, and there's even --

13 THE COURT: We're really talking about two
14 different things. We're talking about the right to get paid
15 for the work that was done. Okay?

16 MR. KUPETZ: Right.

17 THE COURT: I think we have an acknowledgment from
18 the tenant that it's fair to get paid for the work that's
19 done. It's just not under the terms of this contract, but
20 still work that was done. On the other hand, to say that
21 one has a right to the return of the deposit, when the
22 remaining work hasn't been done, is a real stretch. If
23 you're relying upon one email in May of 2017 that says,
24 "We'd like to have the HVAC work done with the seismic
25 work," and in fact, the HVAC work hasn't been done yet.

1 MR. KUPETZ: Well --

2 THE COURT: And the seismic work, it doesn't look
3 like it's going to be done, ever, as far as I can tell.

4 MR. KUPETZ: Right.

5 THE COURT: Certainly not within the timeframes
6 contemplated by paragraph 8. So her -- even if you take her
7 email as a waiver, which I don't, the conditions of the
8 waiver haven't been satisfied.

9 MR. KUPETZ: Right. But the landlord also isn't
10 saying, and as I read our papers and as we presented them,
11 isn't saying, "And return the full deposit to us that
12 remains right now." It's saying --

13 THE COURT: That's what their claim is, it's for
14 the full amount.

15 MR. KUPETZ: Well, we're saying it has to be
16 maintained. And when we finish the work, which if you give
17 -- if whoever is the tenant allows access, the landlord can
18 finish the work.

19 THE COURT: Well, the -- one thing is crystal
20 clear, to me at least, under the language of 25(d), the
21 tenant has the right tomorrow to elect to take the deposit.
22 There's no time limit on the tenant's election.

23 MR. KUPETZ: But it has to be devoted to doing the
24 work for the property. I don't think they have the right to
25 just take the deposit --

1 THE COURT: Again, but that's not a cure issue.
2 That's not a cure issue. They're not proposing to just keep
3 it? Logically, they apply it to the property, but that's
4 not a cure issue. But it doesn't say that they have to
5 segregate it. It just says they take the money. They can
6 have it.

7 You can argue in the future that it would be a
8 windfall, or an improper liquidated damages provision, or
9 putative damages if they don't apply it to the -- finishing
10 the work, but you know, a) you'd have to win that; and b)
11 it's not a cure objection today.

12 MR. KUPETZ: And is it a claim against --

13 THE COURT: No, it's not a claim. There's no
14 claim. They have -- look, I mean, paragraph 25, your
15 client's main point is that they didn't elect to keep the
16 money. Well, but they can elect tomorrow. There's no time
17 limit on it.

18 MR. KUPETZ: But meanwhile, they had the client do
19 --

20 THE COURT: Well, all right, but that's -- again,
21 that's not a -- I don't view that -- I view that as they
22 could've hired, I don't know, some other HVAC person to do
23 that work. And in fact, the landlord hired an HVAC person,
24 right? He didn't do the work himself. So yes, you have to
25 pay for the work you do. I have no idea whether -- what

1 that amount is. It may be considerably less than 322,000.
2 It may be 322,000. We don't know. But you know, it's hard
3 for me to imagine that some Court would dispute that if, in
4 fact, the landlord can show that it paid valid invoices by
5 people who did valid work, and after it's completed, and
6 specified, and approved, such approval not to be
7 unreasonably withheld, they wouldn't be paid for.

8 MR. KUPETZ: But --

9 THE COURT: But that's not a cure objection.

10 MR. KUPETZ: But is that claim against old Sears?

11 THE COURT: No. No. Because it's -- well, I
12 don't know. That's a good question. That's a very good
13 question.

14 MR. KUPETZ: Because otherwise, we're allowing a
15 windfall.

16 THE COURT: Yeah, well, all right. But it may not
17 be a cure objection. But again, I don't have any proof of
18 it today. So I think you're better off having it be a cure
19 objection -- I mean, a quantum meruit claim for the work
20 that was done.

21 MR. KUPETZ: Does Your Honor want to hear any
22 other arguments in terms of the failure of the project, or
23 does the Court want to just --

24 THE COURT: Well, I mean, I don't -- I mean,
25 that's the step -- that's the other issue. We've been

1 talking about the deposits so far. But as far as the
2 consequential damages claim for the apparent, or the
3 asserted inability to get the financing to do the work to
4 complete the project, it's agreed, right, that there's no
5 obligation -- express obligation under the contract to
6 comply with that, right? To do that?

7 MR. KUPETZ: That's correct, Your Honor.

8 THE COURT: So when Mr. Shomof testified that the
9 financing was pulled because there was a condition that
10 there be an agreement with Sears, the agreement was the
11 lease, the 2015 lease. There was an agreement.

12 MR. KUPETZ: Not --

13 THE COURT: Right?

14 MR. KUPETZ: What he was talking about was there
15 need -- and I can run through this, if it's helpful.

16 THE COURT: Okay. But that's how I'm looking at
17 it. I mean, it's hard to see --

18 MR. KUPETZ: There needed to be --

19 THE COURT: I'm getting -- I'm ultimately getting
20 to what I think a business person might understand, which is
21 I don't -- we could walk through all the terms of the
22 agreement, but ultimately, if those terms don't permit what
23 the landlord proposed, it's clear to me that when the bank
24 put a condition that there be an agreement with Sears, it
25 meant a new agreement, because the existing agreement didn't

1 provide for it.

2 MR. KUPETZ: Right, they were --

3 THE COURT: And there's no obligation on Sears'
4 part to provide a new agreement. So I don't see how there
5 could be any damages for Sears in terms of pulling -- you
6 know, in terms of the bank financing being pulled. So we
7 have to look at the agreement.

8 MR. KUPETZ: Well, and we're seeing it's not --
9 it's really based on an implied covenant of good faith and
10 fair dealing.

11 THE COURT: Well, I understand. But if the
12 agreement itself -- the implied terms cannot vary the terms
13 of the agreement, of the contract. So the part -- I mean,
14 this contract -- the 2015 contract is very clearly
15 contemplating this work to be done, and it has a whole
16 section, the construction protocol. It lays it all out what
17 needs to be done, as well as the operative paragraphs that
18 incorporate the protocol.

19 MR. KUPETZ: And in our papers, we tried to
20 address some of that. I don't know if the Court wants me to
21 summarize that and go through it.

22 THE COURT: Go ahead. I mean, I don't see how
23 this letter from September of 2018 came close to satisfying
24 those conditions.

25 MR. KUPETZ: Well, let me -- maybe -- if the Court

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1 will allow, I'll walk through it.

2 THE COURT: Okay.

3 MR. KUPETZ: And hopefully, it advances the cause.

4 THE COURT: Okay.

5 MR. KUPETZ: Prior to Sears entering Chapter 11,
6 the landlord was in the discussions with Sears regarding
7 plan rehabilitation and redevelopment of the building.

8 THE COURT: Right.

9 MR. KUPETZ: And that's set forth in paragraphs 39
10 through 50 of Ms. Shomof's declaration, ECF 4625.

11 THE COURT: Right.

12 MR. KUPETZ: There were communications with Mr.
13 Velkei, who was one contact, a lawyer out in California that
14 the landlord had for Sears. There's the letter that the
15 Court referred to, the 9/25/2018 letter, which did propose
16 closing the store for six months. That was in the
17 landlord's -- neither a requirement nor a demand.

18 They didn't get a substantive response refusing
19 it, and they just couldn't get any engagement from Sears at
20 all after the Chapter 11 filing. Page 45 -- paragraph 45 in
21 the Velkei -- or in the Shomof declaration referred to --
22 talks about how Mr. Velkei advised him to contact Sears
23 bankruptcy counsel. There was a letter actually from myself
24 to the Debtor's counsel, which was Joint Exhibit 12.

25 THE COURT: But -- could I interrupt you?

1 MR. KUPETZ: Uh-huh.

2 THE COURT: Because this goes through what's in
3 your pleadings. And let's assume all of that is true, the
4 lease amendment has a specific section dealing with seismic
5 work. It has certain deadlines in it. And then it says,
6 "The plans and specifications schedule authorized hours of
7 construction activity and remediation plan for set seismic
8 work shall be preapproved by tenant, pursuant to the
9 demolition and construction protocol attached hereto as
10 Exhibit C, and conducted," that's the next step, "conducted
11 in a manner that creates the minimum possible visual and
12 noise inconvenience to tenant and its customers."

13 So then you go to Exhibit C, the demolition and
14 construction protocol, and 2(b) -- Section 2(b) states,
15 "Landlord shall provide two weeks' notice for any demolition
16 or construction work not involving remediation or removal of
17 hazardous materials of the building parcel, and shall
18 include in that notice the scope of work contemplated, a
19 detailed set of plans and specifications for the same,
20 together with the schedule of authorized hours of
21 construction activity and remediation plan for the same.
22 Tenant shall have ten business days from receipt of
23 landlord's both notice and complete detailed plans of
24 specifications to provide any comments and/or objections.
25 No reply from tenant within that period shall constitute

1 approval. Landlord may proceed with the work in question
2 after complying with the aforesaid procedures, provided the
3 work in question is approved by tenant or deemed approved by
4 tenant as aforesaid."

5 And then (c) deals with if tenant lodges timely
6 objections, "The parties hereto must agree upon the scope
7 and course of the work, together with the schedule,
8 authorized hours of construction activity, and remediation
9 plan for the same before it may proceed. Such consent by
10 tenant may not be unreasonably withheld."

11 So it appears quite clear to me that A) the
12 landlord did not provide the type of proposal -- details,
13 set of plans, specifications, et cetera, that would -- in
14 the September letter, that would start the ten day clock
15 ticking. And it may have been, as a business person,
16 reasonable to assume that he could ignore that and just
17 discuss things, and try to work from a baseline, which he
18 knew was clearly unacceptable, to something that would be
19 acceptable. But that didn't happen.

20 So I think it would then be incumbent upon him
21 when he wasn't getting any more response than the initial
22 response he got back, which was arguably a no, although it
23 was a no to something that didn't really need to be
24 responded to under this Section 2(b), because it was
25 responding to something other than a 2(b) type of proposal.

1 But if he wanted to bind Sears in the face of silence, he
2 had a means to do so. He could make that type of proposal.
3 And if there was no response within ten days, it's deemed
4 accepted. The affidavit says that never happened, and it's
5 not really Sears' fault.

6 MR. KUPETZ: It's correct that didn't happen.
7 Realistically, as the reply does discuss, it's really an
8 illusory kind of provision, because --

9 THE COURT: It's a highly detailed provision.

10 MR. KUPETZ: But without --

11 THE COURT: The parties entered into a separate
12 multi-page -- I mean, a 36 page amendment to their lease,
13 contemplating all of these things, with then a lengthy
14 Exhibit C protocol. It couldn't be more detailed. And when
15 you compare it to the provision in a lease that basically
16 gives the landlord to terminate for any reason, including
17 its own financial gain, which the California courts say is
18 perfectly acceptable and rules out any breach of the implied
19 covenant of good faith and fair dealing, it's hard to see
20 how you could somehow say, "Oh, no. The parties did specify
21 all of this, but we can just make a proposal and then
22 somehow bind the debtor to having to front all of our
23 financing and construction costs." This just doesn't really
24 fly.

25 MR. KUPETZ: But in the real world, as Mr. Velkei

1 said in his response, the very last line of his response.

2 "In order for this project to move forward, there's got to
3 be collaboration." And there's --

4 THE COURT: In the real world, parties write
5 agreements that they live up to. This agreement spelled out
6 what was to happen. If there's a non-cooperating party, you
7 give it your best shot to comply with the requirements of
8 2(a). And frankly, at that point, the non-responding party
9 is at real risk. You know?

10 I mean, if there are details that they could have
11 negotiated, but the non-responding party, Sears, lets it go,
12 they're stuck with it. There's an implementation feature.
13 You know, that's 2(c), but they're stuck. Didn't happen.
14 You know, it's -- I appreciate business people think
15 differently sometimes than their agreements, but the
16 agreements governed, unless they're waived. And there's no
17 waiver here, this issue.

18 MR. KUPETZ: It sounds like the Court has seen the
19 papers and doesn't want to hear argument.

20 THE COURT: Yeah. Your papers are pretty clear on
21 this at this point.

22 MR. KUPETZ: Any other questions, Your Honor?

23 THE COURT: No, I don't think so.

24 MR. KUPETZ: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. WEAVER: Sorry, Your Honor. I just need to
2 make clear, and forgive me -- indulge me for one moment.
3 Just so we're -- I know Your Honor wasn't ruling on this
4 point, and it's not before Your Honor, but to be clear that
5 my client, Transform, is responsible for the cure
6 obligations of any contract that it assumes and assigns --

7 THE COURT: Right.

8 MR. KUPETZ: -- there's not -- that was agreed to
9 as part of the APA, there's nothing before the Court today,
10 Your Honor, about any other type of damages that might be
11 owed to this landlord --

12 THE COURT: No, I agree.

13 MR. WEAVER: -- and who would be responsible for
14 that.

15 THE COURT: Well, that's fair. But I think, to be
16 clear, I'm also not authorizing in a ruling here that denies
17 the landlord's cure objection as to return of the deposit,
18 that shouldn't be taken to mean that Transform is authorized
19 to just take that deposit and put it to general uses.

20 MR. WEAVER: Understood, Your Honor. That was not
21 at all how I understood Your Honor to speak, but I just
22 wanted to make clear that that Transform's obligations are
23 limited here, Your Honor, to cure amounts that we're
24 discussing.

25 THE COURT: That's right.

1 MR. WEAVER: Nothing further from Transform, Your
2 Honor.

3 THE COURT: Okay. All right. Sears Roebuck was
4 party to a 2011 lease, which was amended and restated in a
5 December 30, 2015 lease of an interest in real property
6 located at 10309 Folsom Boulevard. No, I'm sorry. Is that
7 the location? Well, let me just say in Los Angeles.

8 MR. WEAVER: Olympic Boulevard, Your Honor.

9 THE COURT: Olympic Boulevard. In Los Angeles.
10 Consistent with prior orders that I have issued in this
11 case, Sears sent out a notice of proposed assumption and
12 assignment of the lease to Transform Holdco. That notice --
13 that set of notice procedures gave the landlord the
14 opportunity to object to the assumption and assignment,
15 and/or to assert that there were outstanding obligations
16 under the lease, i.e. that there were defaults under the
17 lease, that created a monetary obligation on behalf of the
18 tenant to be cured under Section 365 of the Bankruptcy Code.

19 The agreement between Sears and Transform lays out
20 who's responsible for that cure. But the key point for my
21 ruling today is that cure is only owed in respect of
22 monetary obligations for defaults before the assignment of
23 the lease, including prepetition defaults.

24 The landlord here asserted three sets of defaults,
25 two of which the assignee, Transform, has agreed are, in

1 fact, properly owed cure amounts, or that will be properly
2 owed in the case of tax reimbursements, in the amounts
3 asserted. So there's no remaining dispute between the
4 landlord and Transform, which under the agreement with
5 Sears, would be responsible to pay such cure with respect to
6 the common area maintenance or property tax reimbursement
7 cure amounts asserted in the landlord's objection.

8 In addition, the landlord's cure objection raised
9 two other cure issues. And I find that both of the cure
10 claims or both of those cure claims, although one was
11 asserted in a supplemental cure claim, were timely made.

12 First, the landlord refers to the remaining
13 amounts in a so-called construction estimate deposit,
14 established under Section 25 of the 2015 amended and
15 restated lease, which was established originally in the
16 amount of \$3,250,000.

17 And parties agree that substantial amount -- a
18 substantial amount of that sum has already been paid out of
19 such deposit. The landlord contends that in respect of work
20 that it did, or its contractors or subcontractors did, in
21 the sum of \$322,649.80 is due and owing to the tenant to be
22 paid from the remaining amount in the construction estimate
23 deposit.

24 Secondly, it contends that it would be a breach of
25 the lease if the landlord did not use the remaining amount

1 in the construction estimate -- I'm sorry, if the tenant did
2 not use the remaining amount in the construction estimate
3 deposit to reimburse landlord for construction expenses at
4 the premises, presumably in the future.

5 Secondly, the landlord stated in its original cure
6 objection that there was an immediate need to make extensive
7 renovations at the property as part of an overall
8 rehabilitation plan to develop the property, which is only
9 70 percent occupied by Sears.

10 And to conclude, work that under paragraph or
11 Section 8 of the 2015 lease, with respect to seismic work,
12 needed to be work in a supplemental -- a timely supplemental
13 objection. The landlord asserted a multi-million dollar
14 claim based on the alleged breach by the debtor tenant of
15 its implied covenant of good faith and fair dealing under
16 the lease, allegedly because the tenant did not reasonably
17 respond to or cooperate with the landlord in permitting the
18 landlord to do such work.

19 That multi-million dollar figure was comprised of
20 cost that the landlord stated it had incurred to lay the
21 groundwork for that work, and/or the failure allegedly
22 attributable to the debtor of the landlord's financing to
23 commence such work.

24 The first set of issues depends upon, in the first
25 instance, a construction of the 2015 amended and restated

1 lease, which was entered into, as stated in the recitals, in
2 part because additional work was contemplated on the
3 building and the -- I'm sorry, the parties "had a number of
4 issues to dispute," with respect to the terms of the 2011
5 lease. That prompted the parties to enter into the amended
6 restatement.

7 The 2011 lease provides in Section 2(a)(3), "The
8 parties acknowledge that it is most critical to the
9 successful operation of tenant's business at the premises,
10 the tenant has access, use, and enjoyment of those portions
11 of the building parcel shown on the site plan as 'tenants
12 control the area,'" including such rights as are set forth
13 below.

14 "Without tenants' prior approval, which may be
15 withheld for any or no reason in its sole discretion,
16 landlords shall not construct or install any improvements,
17 or make any changes to tenants' control area, or interfere
18 with, or obstruct tenants' use thereof in any manner
19 whatsoever, including without limitation by reconfiguring
20 the parking spaces."

21 The 2015 amendment and restatement acknowledges
22 that additional work will be done and sets forth the
23 parties' agreement in connection with that work. Section 2
24 of the document begins with an unlettered paragraph by
25 stating that, "Landlord at landlord's sole cost and expense

1 shall design, construct, and complete all work contained
2 within this agreement in compliance with the demolition and
3 construction protocols attached hereto, and made a part
4 hereof as Exhibit C, including without limitation, work
5 described below in Sections 3, 4, 5, 6, 7, 8, 10, and 11,
6 subject to the terms of Section 9 below, on or before April
7 1, 2017, unless a different completion date is explicitly
8 set forth below, in which case the different completion date
9 set forth below shall govern, or unless the date is
10 otherwise amended in writing by means of a further amendment
11 to this agreement.

12 "Final plans and specifications shall be reviewed
13 and approved by tenant pursuant to the demolition and
14 construction protocol, even if the work in question is
15 addressed in the exhibits attached hereto."

16 Paragraphs 3 through 8 and 10 all lay out work
17 with respect to specific projects. In order: low voltage
18 service, HVAC, plumbing, façade, signage, seismic work, and
19 freight elevator work, which are all, as I noted, referenced
20 in this section that I quoted.

21 The agreement not only has an integration
22 provision in Section 19, but also has a no waiver provision,
23 Section 17, which states, "Unless expressly waived or
24 released in either the building lease, or in this amendment,
25 or in a separate writing signed by the waiving party, no

1 provision of either the building lease or this amendment
2 shall be deemed to be a waiver by either party of any rights
3 or claims against the other, either arising out of the
4 building lease as amended, or out of any other agreement or
5 circumstances."

6 It is undisputed that the specific work to be done
7 or completed under paragraph 2 was not done -- to be done by
8 April 1st, 2017, was not in fact completed by April 1st,
9 2017. This is relevant to the claim for the \$322,000, as
10 well as to the assertion that the money currently being held
11 as part of the construction estimate deposit needs to remain
12 to be held in that deposit and paid to the landlord under
13 the terms of the agreement.

14 Paragraph 25, as I noted, provides for the
15 establishment of the construction estimate deposit. It is
16 -- it was funded by the landlord as set forth in that
17 provision, "To partially secure landlord's design repair
18 construction and completion obligations under this
19 amendment," i.e. that landlord's obligation to complete the
20 work.

21 The agreement went on to establish -- to provide
22 that tenants shall, in turn, within a reasonable time
23 thereafter, but in any event within 30 days of landlord's
24 written request, deposit that money in escrow "to enable
25 able landlord to be able to draw upon those funds in the

1 construction fund escrow to pay for landlord's design repair
2 construction and completion work, as required per this
3 amendment."

4 However, the parties have agreed that the funds
5 would be held by the landlord. In other words, the escrow
6 was never set up -- I'm sorry, held by the tenant. In other
7 words, the escrow was never set up by the tenant and the
8 landlord never requested the establishment of an escrow.

9 And it is agreed that a substantial amount of
10 those funds were, in fact, used to pay or reimburse the
11 landlord for work that it did under Section 2 through 10.
12 Of particular relevance to the first remaining dispute is
13 Section 25(d) of the lease, which states, "In the event
14 landlord does not complete the work contemplated in Sections
15 3, 4, 6, and 7 by April 1, 2017, the remainder of the funds
16 in construction escrow shall be released to tenant at
17 tenant's election, so that tenant can cause the work to be
18 completed, and tenant shall be entitled to payment by
19 landlord any additional amounts necessary to complete the
20 work."

21 Paragraph 25(d) then goes on to state, "Upon
22 landlord's completion of the work described in Sections 3,
23 4, 5, 6, and 7 in a timely manner, and its inspection and
24 acceptance by tenant, any remaining construction and
25 estimate deposit fund shall be disbursed to landlord,

1 subject to the review and approval of the parties regarding
2 the amount in question."

3 As I noted, it's undisputed that the work required
4 by Sections 3, 4, 6, and 7 was not completed by April 1,
5 2017.

6 It's also disputed that, as of today, the landlord
7 has not made an election to have the remainder of the funds
8 released -- I'm sorry -- the tenant has not made an election
9 to have the remaining funds released to the tenant so that
10 the tenant can cause the work to be completed.

11 (Pause)

12 THE COURT: There is no time limitation, in the
13 agreement, on when the tenant may make such an election,
14 however. So, conceivably, the tenant could make the
15 election tomorrow given the landlord's failure to complete
16 the work in Section 346 and 7 by April 1, 2017.

17 The landlord contends, however, that the parties
18 modified the deadline set forth in the first sentence of
19 Section 25(d) by its course of dealing or their course of
20 dealing.

21 The facts to support that contention are two-fold.
22 First, there are some invoices with backup in the record
23 showing 14 payments for work done by the landlord after
24 April 1, 2017, apparently on these -- one or more of these
25 four projects. Those required to be completed by the

1 landlord under Section 346 and 7 of the 2015 amended and
2 restated lease.

3 Secondly, there is a May 2017 e-mail from a Sears
4 real estate employee to the landlord which states or points
5 out to the landlord that the landlord has not met its
6 deadline to complete that work by April 1, 2017 and then
7 goes on to state that Sears would be prepared to have the
8 remaining A track work done later in tandem with the seismic
9 work required under paragraph -- or Section 8 of the
10 agreement to avoid two sets of disruption of Sears's
11 operations.

12 (Pause)

13 THE COURT: It is reasonably clear to me that
14 Sears and the landlord were aware of -- that the landlord
15 continued work after April 1 and that Sears was aware of it.
16 What we do not have is a signed written waiver as required
17 by Section 17 of the 2015 amended and restated lease.

18 (Pause)

19 THE COURT: The landlord contends that the cure
20 claim for the 322,000 and change is not a default under the
21 lease and it's not being paid out of the construction fund
22 escrow because of the release feature of the first sentence
23 of paragraph 25(d) and the fact that the landlord doesn't
24 have the right to the release of any remaining funds in the
25 construction fund escrow because there would not a

1 construction fund escrow and/or because the work has not
2 been completed in a timely manner as required in the second
3 sentence of that section.

4 I construe the first sentence of Section 25(d) to
5 provide that the funds in the construction escrow fund could
6 be released to tenant upon the tenant's election given the
7 failure to complete the work.

8 The election, in fact, has not occurred but in
9 equal amount the work was not completed by the dates
10 required; not only in paragraph 2(d) but also in paragraph
11 25 and Section 2.

12 (Pause)

13 THE COURT: Given the failure to complete the work
14 by the time required, I believe that there is no contract
15 right to its payment.

16 On the other hand, there may be a quantum meruit
17 right to its payment and there may be well a right as a
18 quantum meruit matter to be paid out of the construction
19 fund given paragraph 25's statement that the fund was
20 required to partially secure the landlord's completion of
21 the work albeit that it was to be completed under the terms
22 of the agreement.

23 But it is clear to me that there is no cure claim
24 per se for the 322,000 because the work was not, in fact,
25 completed by the time that Section 2(a) requires it to be

1 completed.

2 Again, this doesn't preclude a quantum meruit
3 claim and it doesn't preclude a claim that the funds that
4 were held in escrow should be devoted to pay the amount.

5 But, as far as a cure objection is concerned,
6 there is not cure obligation.

7 There is no present monetary default under the
8 contract.

9 As pertains to Section 25(d) that leaves the
10 landlord's other contention which is that there is a breach
11 of the contract that needs to be cured if the tenant does
12 not apply the construction estimate deposit to the work, not
13 only done, but to be done by the landlord under the
14 agreement.

15 (Pause)

16 THE COURT: I will note that the landlord does not
17 say that he's entitled to a refund of the remaining deposit
18 today nor could it because the work has not been completed
19 as required by the second sentence of paragraph -- or
20 Section 25(d).

21 The contention as a cure objection really doesn't
22 apply. It assumes a hypothetical that clearly hasn't
23 occurred at this point.

24 The landlord must accept that, because it's a
25 premise of its own argument, that the tenant has not yet

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1 elected, under the first sentence of Section 25(d), to have
2 the construction fund released to it, to the tenant. It is
3 still, therefore, being held and, as provided in that first
4 sentence, if such an election is made, it shall be made "so
5 the tenant can cause the work to be completed to whoever the
6 tenant chooses to have complete the work."

7 The dispute as to what happens to any residual
8 amount is not a cure dispute. It's a dispute for the
9 future. Consequently, that aspect of the landlord's cure
10 objections also should be denied.

11 (Pause)

12 THE COURT: In summary, then, let me be clear. In
13 addition to denying both of those aspects of the landlord's
14 cure objection, the record should be clear that I have not
15 decided what, if anything, the landlord's entitled to be
16 paid for work it has already done. It has not set forth
17 sufficient evidence in the form of backup to support its
18 invoice of 322,000 for that work. Moreover, it has not
19 completed the work by the deadlines stated.

20 (Pause)

21 THE COURT: So, I could not, even if there were a
22 quantum meruit issue before which there isn't since that
23 would not be an issue under the contract, determine what on
24 a quantum meruit basis the landlord might be owed.

25 Secondly, I have not determined whether if such a

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1 claim is ever fixed the construction fund escrow can be a
2 source of payment for it. I just noted the possibility as
3 it may exist either under the introductory paragraph to
4 Section 25 or the operation of the first sentence of
5 Section 25(d).

6 The landlord has contended that the May 2017
7 e-mail and the fact that a relatively small amount of money
8 was paid for work done after April 1, 2017 by it or its
9 subcontractors should, as a matter of course of performance
10 or course of dealing under California law, which the parties
11 agree controls this dispute as far as contract
12 interpretation is concerned, meaning that the tenant waived
13 its rights to completion by April 1 and, therefore, that it
14 has a cure claim.

15 California generally follows the plain meaning
16 rule and excludes the admission of parol evidence
17 particularly for only -- excuse me, but that is the case
18 here, where there is an integrated written agreement which,
19 as I noted before, this agreement is.

20 And the parol evidence rule itself can be used
21 only to resolve an ambiguity in an agreement and this
22 agreement is not ambiguous as far as the deadlines that it
23 sets for performance.

24 (Pause)

25 THE COURT: The California courts, however, will,

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1 under certain circumstances, permit consideration of the
2 parties' course of performance of an agreement which is with
3 respect to a transaction that involves repeated occasions
4 for performance by a party and the other party with
5 knowledge of the nature of the performance and an
6 opportunity for objection to it accepts the performance or
7 acquiesces in it without objection.

8 Clearly, evidence of a course of performance is
9 admissible if it does not directly contradict the terms of a
10 written agreement but merely explains or supplements them.

11 (Pause)

12 THE COURT: A more difficult issue is whether the
13 course of performance actually permits modification or
14 alteration of the plain terms of agreement, of an agreement,
15 if an actual waiver is not shown.

16 And, here, no waiver would be shown given the
17 express no waiver provision term or the express term
18 limiting the nature of a waiver in paragraph 17 of the
19 agreement.

20 (Pause)

21 THE COURT: As far as the deadlines are concerned,
22 I do not believe that the parties' course of -- the evidence
23 of the parties' course of performance is sufficient to
24 overcome the plain terms of the agreement as to when the
25 work was to be completed.

1 The payment of a relatively small number of post-
2 April 1 work invoices, or invoices for work done
3 post-April 1, to me also does not reflect more conceivably
4 then the tenant causing work to be completed after the
5 deadline passed which Section 25(d) specifically permits the
6 tenant to choose any party to use to complete such work,
7 including, without limitation, the landlord.

8 That leaves the May e-mail which acknowledged the
9 default to not acquiesce in it but did request, in the light
10 of the default, completion of the HVAC work in connection
11 with the seismic work to avoid additional disruption. That
12 was in May of 2017.

13 The seismic work has yet to start. To me, that is
14 not sufficient evidence of the course of performance to show
15 that the parties agreed to waive the April 1 deadline.

16 (Pause)

17 THE COURT: The second dispute, as I noted,
18 pertains to the landlord's contention that the tenant
19 breached the implied covenant of good faith and fair dealing
20 that exists in every contract governed by California law,
21 including lease agreements.

22 I guess before I go to that, let me cite Lennar
23 Mare, M-A-R-E, Island v. Steadfast Insurance Company, 176
24 F.Supp 3d. 949, Ed. CA 2016, as the source for my summary of
25 California law on contract interpretation, use of parol

1 evidence, resolution of ambiguities and course of
2 performance.

3 That case has an extensive discussion of all of
4 those issues citing substantial California law opinion.

5 (Pause)

6 THE COURT: So, the implied covenant of good faith
7 and fair dealing clearly exists in all contracts governed by
8 California law including leases, Wolf v. Walt Disney
9 Pictures and Television, 162 Cal App 4th, 1107, Cal App
10 2008.

11 There are serious limitations on it, however, as
12 noted by the Wolf Court "the implied covenant will only be
13 recognized to further the contract's purpose. It will not
14 be read into a contract to prohibit a party from doing that
15 which is expressly permitted by the agreement itself."

16 The general rule regarding the covenant of good
17 faith is plainly subject to the exception that the parties
18 made by express provisions of the contract, grant the right
19 to engage in the very acts and conduct which would otherwise
20 have been forbidden by an implied covenant of good faith and
21 fair dealing.

22 This principle is consistent with the general rule
23 that implied terms cannot vary the express terms of a
24 contract.

25 If the defendant did what it was expressly given

1 the right to do, there could be no breach.

2 Thus, although it has been said, the implied
3 covenant finds particular application in situations where
4 one party is invested with a discretionary power affecting
5 the rights of another if the express purpose of the contract
6 is to grant unfettered discretion and the contract is
7 otherwise supported by adequate consideration that the
8 conduct is, by definition, within the reasonable expectation
9 of the parties and can never violate an implied covenant of
10 good faith and fair dealing.

11 The reference to reasonable expectations is
12 important. I'm sorry. See, also, *Storek & Storek v. Citi*
13 *Corp Real Estate, Inc.*, 100 Cal App 4th 44, Court of Appeals
14 Cal 2002.

15 The requirement of reasonableness or reasonable
16 expectations is important to the implication of the implied
17 covenant in the context where there is no express agreement
18 governing the parties' expectations.

19 Even there, the burden that the implied covenant
20 would place on the party against which it is being asserted
21 must be reasonable. See *Sachs v. Exxon Co., U.S.A.*, 9 Cal
22 App 4th 1491, Cal App 1992.

23 Here, as I noted, the 2015 amended and restated
24 lease was entered into by the parties in light of
25 anticipated substantial work to be done on the building

1 including, without limitation, as set forth in paragraph 8
2 of the agreement, seismic work.

3 That paragraph says landlord is responsible for
4 all necessary seismic repairs and improvements within and in
5 the vicinity of the premises and the overall building.

6 The landlord shall use best efforts to obtain
7 necessary government approvals to perform such seismic
8 repairs and improvements within 12 months after the City of
9 Los Angeles's approval of administrator's determination of
10 the city applications described in Recital D of this
11 amendment and complete such seismic repairs and improvements
12 within 12 months of when said permits are issued subject to
13 the terms of Section 9 below.

14 As an aside, that Section 9 prohibits work over
15 the specifically laid out Christmas sale season.

16 Section 8 then continues; notwithstanding anything
17 contained herein to the contrary, all seismic permits and
18 seismic repairs and replacements shall be applied for,
19 installed and completed within such time as required by law
20 of by governmental authorities.

21 The plans and specification schedule, authorized
22 hours of construction activity and remediation plan for such
23 seismic work shall be pre-approved by tenant pursuant to the
24 demolition and construction protocol attached hereto as
25 Exhibit C; which also, of course, was referred to in

1 Section 2 of the agreement.

2 And, then, Section 8 continues; and conducted in a
3 manner that creates the minimum possible visual and noise
4 inconvenience to tenant and its customers.

5 Turning to Exhibit P -- C, excuse me, the
6 demolition and construction control protocol. It provides,
7 in Section 2(b), a mechanism for the landlord to make its
8 proposal and contemplated by Section 8, that I just quoted.

9 Section 2(b) of Exhibit C states landlord shall
10 provide two weeks' notice for any demolition or construction
11 work not involving remediation or removal of hazardous
12 materials at the building parcel and shall include in that
13 notice the scope of work contemplated, a detailed set of
14 plans and specifications for the same, together with the
15 schedule, authorized hours of construction activity and
16 remediation plan for the same.

17 Tenant shall have ten business days from receipt
18 of landlord's both notice and complete detailed plans and
19 specifications to provide any comments and/or objections.

20 No reply from tenant within that period shall
21 constitute approval.

22 Landlord may proceed with the work in question
23 after complying with the aforesaid procedures provided the
24 work in question is approved by tenant or deemed approved by
25 tenant as aforesaid.

1 The landlord, I believe, acknowledges that the one
2 written communication that is in the record, the September
3 28, 2018 email to Sears in-house counsel working on
4 building-related matters with respect to this real property,
5 did not comply with Section 2(b) that I've just quoted.

6 Even if that wasn't conceded, it's clear from
7 reading the email and the attachments that it does not
8 include a detailed set of plans and specifications together
9 with a scheduled authorized hours of construction activity
10 and remediation plan as required by Section 2(b) of
11 Exhibit C.

12 There's nothing in the record to suggest that such
13 a proposal was ever made.

14 What the landlord contends instead is that it was
15 understood by the parties that the September 28 e-mail was a
16 negotiating start and that Sears did not thereafter
17 negotiate with the landlord or even after the -- even after
18 the start of the bankruptcy case respond to the landlord
19 when it sought to negotiate. That, the landlord contends,
20 constitutes a breach of the implied covenant of good faith
21 and fair dealing. I conclude to the contrary that it does
22 not constitute such a breach. The parties have very
23 carefully laid out, as was evidently reasonable for them to
24 do given the nature of the 2015 amended and restated lease,
25 how such a proposal would be made, when it would be deemed

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1 accepted, when it would be treated as rejected and what the
2 parties were supposed to do thereafter.

3 Here, there was no such proposal made in the first
4 place. If, when faced with no response from the tenant, the
5 landlord wished to proceed, the agreement actually gave the
6 landlord a mechanism in which to do so and spelled out the
7 tenant's rights and duties with respect to such a mechanism.

8 The landlord would make a proposal compliant with
9 Section 2(a). The tenant would have ten days to object.
10 And if no reply from the tenant within that period was
11 received, the tenant would be deemed to have approved and
12 the landlord could proceed with the work in question.

13 The landlord did not follow that protocol.

14 It's clear, further, although unnecessary for my
15 ruling, that in response to the September 28 proposal, which
16 clearly was not in compliance with Section 2(b) of
17 Exhibit C, Sears responded negatively as set forth in
18 Mr. Velkei's e-mail in the email chain.

19 (Pause)

20 THE COURT: It should be clear though, but I'll
21 state that, that negative response did not trigger an
22 obligation by Sears under Section 2(c) of Exhibit C which
23 states, if tenant lodges timely objections to any notice
24 hereunder, the parties hereto must agree upon the scope and
25 course of the work together with the schedule authorized

1 hours of construction activity and remediation plan for the
2 same before it may proceed.

3 Such consent by tenant may not be unreasonably
4 withheld.

5 But, again, since no such proposal was made in the
6 first place, the rejection by Sears indicates that merely
7 the non-compliant proposal was unacceptable. It doesn't
8 trigger an obligation, on the tenant's part, to proceed to
9 work on a proposal with the consent not to be unreasonably
10 withheld.

11 Indeed, the rejection beyond rejecting something
12 that was non-compliant itself refers to the fact that the
13 proposal had significant holes in it as far as laying out a
14 detailed set of plans and specifications and timing.

15 So, given that fact or set of facts as laid out in
16 the agreement between the parties, there is no implied
17 covenant that could be breached given that the parties
18 actually specified how to deal with this set of potential
19 facts.

20 I'll also note that the contention that the tenant
21 was responsible for the termination of prospective financing
22 for the renovation or remediation, by the terms of the
23 landlord's own argument, is not tenable.

24 The testimony was to the effect that the bank's
25 condition was that there be an agreement with Sears as far

1 as the access for the seismic work and remediation.

2 The parties, indeed, had an agreement. The
3 landlord didn't follow it. Consequently, what the condition
4 required was a new agreement which Sears was under no
5 obligation to provide either under the plain terms of the
6 parties' existing agreements or any sort of implied covenant
7 of good faith and fair dealing.

8 So, I will deny that aspect of the cure objection
9 as well. So, I'll enter an order granting the objection as
10 far as the first two points, CAM and tax reimbursement and
11 deny it in all other respects.

12 You don't need to refer --

13 MS. MARCUS: Your Honor --

14 THE COURT: I'm sorry. I don't -- let me just
15 finish.

16 You don't need to do anything more than refer to
17 my bench ruling.

18 Okay. That's someone on the phone?

19 MS. MARCUS: Yes. Sorry, Your Honor. This is
20 Jacqueline Marcus on behalf of Sears Holdings Corporation.

21 THE COURT: Yes.

22 MS. MARCUS: I'm reluctant to venture into this
23 after you've spent so much time on it this morning. But I
24 just wanted one clarification.

25 THE COURT: Okay.

1 MS. MARCUS: You said a little bit earlier that
2 you haven't decided whether the landlord is entitled to be
3 paid for the work it had already done and that there might
4 be a claim for quantum meruit.

5 THE COURT: Right.

6 MS. MARCUS: On behalf of Sears, what I want to
7 make sure of is that there's nothing in your order today
8 that basically transfers what might have been an unsecured
9 claim against Sears into a post-petition administrative
10 claim because the lease is being assumed and assigned. But,
11 from our perspective, any amounts that would be owed to the
12 landlord would really be attributable to Transform not to
13 the debtors.

14 THE COURT: Well, that issue isn't really before
15 me. The benefit obviously has to be for the debtor, for the
16 estate, as far as the administrative claim is concerned.
17 So, you know -- but that issue really isn't before me. I'm
18 not allowing any claim. In fact, I don't have any real
19 evidence to support a claim.

20 And, again, although I'm not ruling on this, it
21 does appear to me that the purpose of the agreement is to
22 secure whatever amounts are owing. I'm not talking about
23 the 3.25 million agreement. It's to secure whatever amounts
24 are owing in respect to the construction. So, all of the
25 issues would have to be sorted out.

1 MR. MARCUS: I -- yes. I guess from the debtor's
2 point of view if it -- if it were going to be in a worse
3 position as a result of the assumption than it would have
4 been as a result of rejection --

5 THE COURT: Right.

6 MS. MARCUS: -- that would obviously be of concern
7 to us.

8 THE COURT: Well, I find that -- I understand it
9 would be a concern but I find it -- that that state of
10 affairs would be highly unlikely given (a) the purpose of
11 the construction fund and (b) the requirement for any
12 administrative expense that it be for the benefit of the
13 debtor's estate.

14 MS. MARCUS: Okay. Thank you.

15 THE COURT: You know, here this is --

16 MS. MARCUS: That --

17 THE COURT: It's construction work that benefits
18 the building but not really Sears except, you know, to the
19 extent that the -- it's new Sears, the landlord -- the
20 landlord's new tenant, Transform.

21 MS. MARCUS: Okay. Thank you, Your Honor.

22 THE COURT: But I'm not ruling on that either. I
23 mean, that's really not before me.

24 MS. MARCUS: I know. I know.

25 THE COURT: What's before me now is a cure

1 objection and that requires defaults under a contract given
2 the default by the tenant in providing the services under
3 the contract -- I'm sorry, given the default by the landlord
4 to provide the services under the contract, I don't see a
5 default under the contract to be paid for. Although, you
6 know, again, that --

7 MS. MARCUS: Okay.

8 THE COURT: -- doesn't necessary mean that there
9 isn't some other right to payment from some source.

10 Okay. So, you don't have to --

11 MS. MARCUS: Thank you.

12 THE COURT: -- settle that order formally but you
13 should circulate it to counsel for the landlord as well as
14 counsel for the debtor.

15 MR. WEAVER: We'll do that, Your Honor. We'll get
16 that e-mail to you as soon as we can.

17 THE COURT: Okay.

18 MR. WEAVER: And Your Honor should note our
19 deadline, I believe, is a week from today. So, we'll work
20 to get the order to you --

21 THE COURT: Okay.

22 MR. WEAVER: -- before then.

23 THE COURT: That's fine. I -- you know, frankly,
24 I don't know if there's any hope in doing this but I still
25 urge the parties to try to work with each other to get the

1 construction going. That might be a no brainer for each
2 side.

3 MR. WEAVER: Your Honor, my understanding is that
4 the parties have reached -- Transform has reached out, Your
5 Honor.

6 THE COURT: All right. Okay.

7 MR. WEAVER: Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. KUPETZ: Thank you.

10 (Whereupon, these proceedings were concluded at 1:36
11 p.m.)

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6 Court will enter an order granting 133 9

7 Landlord's cure objection as far as CAM

8 and tax reimbursement are concerned but

9 denied as to all other aspects

10

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13 JOINT EXHIBITS:

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1 C E R T I F I C A T I O N

2

3 We, Lisa Beck, Jamie Gallagher and Pamela Skaw certify that
4 the foregoing transcript is a true and accurate record of
5 the proceedings.

6

7 _____

8 Lisa Beck

9

10 _____

11 Jamie Gallagher

12

13 _____

14 Pamela Skaw

15

16

17

18 Date: August 5, 2019

19

20 Veritext Legal Solutions

21 330 Old Country Road

22 Suite 300

23 Mineola, NY 11501

24

25

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EXHIBIT B

IN RE: SEARS HOLDING CORPORATION, et al.

IZEK SHOMOF

June 24, 2019



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2 SOUTHERN DISTRICT OF NEW YORK	2 WITNESS EXAMINATION BY PAGE
3 In re:	3 IZEK SHOMOF MR. WEAVER 5, 119
4 SEARS HOLDING CORPORATION, et al.,	4
5 Debtors.	5
6 Chapter 11	6 ----- E X H I B I T S -----
7 Case No. 18-23538(RDD)	7 SHOMOF DESCRIPTION FOR I.D.
8 (Jointly Administered)	8 Exhibit 1 Original Cure Objection 10
9	9 Exhibit 2 Supplemental Cure Objection and 12
10 333 South Grand Avenue	10 Reservation of Rights (Store No.
11 Los Angeles, California	11 1008)
12 June 24, 2019	12 Exhibit 3 Amended and Restated Building 16
13 11:08 a.m.	13 Lease
14 DEPOSITION OF IZEK SHOMOF, taken before	14 Exhibit 4 Amended to Amended and Restated 19
15 Donna J. Rudolph, RPR, Certified Shorthand Reporter,	15 Building Lease
16 in and for the State of California.	16
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5 One Liberty Plaza	5 Exhibit 11 Jonathan Shomof letter, dated 102
6 New York, New York 10006	6 9-25-18
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8 KATE MASSEY	8 6801 - 6802
9 (212)225-2354	9 Exhibit 13 Letter from Mark Cohen, dated 119
10 aweaver@cgsh.com	10 4-12-19
11 kmassey@cgsh.com	11 Exhibit 14 E-mail chain, Bates numbered 124
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15 333 South Grand Avenue, Suite 3400	15 Exhibit 16 Letter from Balboa Financial 129
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17 BY: DAVID S. KUPETZ, ESQ.	17 Exhibit 17 Bank OZK Closing Checklist, 133
18 CLAIRE K. WU, ESQ.	18 revised 10-3-18
19 (213)626-2311	19 Exhibit 18 Letter entitled Bank of Ozarks, 139
20 dkupetz@sulmeyerlaw.com	20 Bates numbered SK 3117 - - 397
21 ckwu@sulmeyerlaw.com	21
22	22
23 Also Present:	23 (EXHIBITS TO BE PRODUCED)
24 Jonathan Shomof	24
25 Ericson Alviz	25

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<p>1 LOS ANGELES, CALIFORNIA; MONDAY, JUNE 24, 2019 2 11:08 A.M. 3 4 IZEK SHOMOF, 5 called as a witness, being first duly sworn to tell the 6 truth, the whole truth, and nothing but the truth, 7 testified as follows: 8 9 EXAMINATION 10 BY MR. WEAVER: 11 Q Good morning, Mr. Shomof. 12 A Good morning. 13 Q My name is Andrew Weaver. I'm with the law 14 firm Cleary Gottlieb Steen & Hamilton. We are counsel 15 to Transform Holdco, the purchaser of certain assets of 16 Sears corporation out of Sears' bankruptcy. 17 Have you been deposed before? 18 A Yes. 19 Q How many times? 20 A Few times. 21 Q More than five? 22 A I would say more than five, yeah. 23 Q More than ten? 24 A No. 25 Q When was the last time you were deposed?</p>	<p>1 Is that okay if I just refer to it as "the 2 dispute"? 3 A Yes. 4 Q And it's a little bit complicated about who is 5 Sears in this instance. There is pre-sale Sears, the 6 estate, the bankruptcy estate. There is post-sale 7 Transform, the owner of Sears' assets. But I think for 8 purposes of today's deposition, I can refer just to the 9 tenant as "Sears" for purposes of this discussion. If 10 for any reason I need to differentiate, I will, as long 11 as that's okay with you. 12 A So what you're saying is the overall 13 conversation, if you mention it, you're saying "Sears," 14 it means -- 15 Q The tenant at the Boyle Heights property 16 location. 17 A Got it. 18 Q Whoever the actual owner of that -- 19 A That's it. I understand. 20 Q -- isn't necessarily relevant. 21 A I understand. 22 Q Unless it is, and I will clarify, if that 23 makes sense. 24 A Got it. 25 Q Okay. And you are familiar, I assume, with</p>
Page 6	Page 8
<p>1 A Maybe five years ago. 2 Q Just a reminder of some of the processes and 3 procedures for today. It's important that you provide 4 verbal responses to my questions. Head nods or verbal 5 sounds won't be reflected on the transcript. 6 It's important that we allow each other to 7 speak, so I will endeavor not to speak over you or 8 interrupt you. And if you could wait until my questions 9 are done before answering, it will make our court 10 reporter's life much easier today. 11 Is there any reason today that you cannot 12 provide truthful testimony? 13 A No. 14 Q And, Mr. Shomof, I note that there are, in 15 addition to your counsel, additional folks in the room 16 today. Can you please identify who those folks are and 17 their role. 18 A Jonathan Shomof. He's my son, but he works in 19 my office. And Eric Alvarez is one of the associate in 20 our office. 21 Q Mr. Shomof, today I'll be speaking about the 22 Boyle Heights property location in the Sears store and 23 referring just generally to this matter as "the 24 dispute," which is the cure objection that the landlords 25 have filed as part of the Sears bankruptcy.</p>	<p>1 the cure objections that have been filed in this dispute 2 as it relates to the -- the Boyle Heights property; is 3 that correct? 4 A Yes. 5 Q Okay. And just so I'm clear, those cure 6 objections were filed on behalf of the Izek Shomof and 7 Eileen Shomof irrevocable children's trust dated 8 February 11, 1999; the Vegas Group, LLC; and East River 9 Group, LLC; is that correct? 10 A Correct. 11 Q Okay. And those three comprise the landlord 12 for this property; is that correct? 13 A Correct. 14 Q So today when I refer to "landlord," I'm 15 referring to those three collectively, again, unless 16 there's a reason to differentiate. Is that okay? 17 A Sounds good. 18 Q Okay. Can you just briefly at a high level 19 explain interaction amongst those three entities, the 20 trust, the Vegas Group, and East River Group, and how 21 they relate to each other? 22 A Vegas Group and East River Group are my other 23 companies. 24 Q Okay. 25 A The irrevocable trust is my family irrevocable</p>

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<p>1 trust. 2 Q I see. 3 So the Vegas Group is one of your companies? 4 A Yes, correct. 5 Q What role do you have in the Vegas Group? 6 A Maybe either secretary or president. I'm not 7 sure exactly. 8 Q Okay. But is it a group that you control in 9 some way? 10 A Yes. 11 Q Okay. And the East River Group, LLC, what 12 role do you have in that organization? 13 A Same thing, either secretary or president or 14 one of them or maybe even two of them. I'm not sure, 15 but yes, I do control it. 16 Q Okay. And then the -- the children's trust, 17 is that a personal trust, I assume, for your children? 18 A Correct. 19 Q Okay. Are there any other landlords related 20 to the Boyle Heights property at issue today? 21 A Not that I could think of. I don't think so, 22 but I'm not 100 percent sure. 23 Q Okay. And as part of the -- there -- there 24 were two objections filed in this bankruptcy, one an 25 original cure objection and then a supplemental cure</p>	<p>1 Q Do you see there that it states the cure 2 amount currently due under the terms of the lease -- 3 A Yes. 4 Q -- is an amount not less than \$1,474,940.61? 5 A Yes. 6 Q And you see that's comprised of three 7 categories. The first, CAM charges in the amount of 8 \$5,270.31; property tax reimbursement in the amount of 9 \$44,868.68; and remaining reimbursement balance for 10 Sears TI construction expense in the amount of 11 \$1,424,801.62. 12 Do you see that? 13 A Yes. 14 Q And that is the total -- those three items 15 added together are the total amounts of cure in the 16 original objection filed by the landlords; correct? 17 A Yes. 18 Q Okay. 19 MR. KUPETZ: I would just note so that the 20 record is clear that there's a footnote right there. 21 MR. WEAVER: We're going to get to the second 22 objection right now. 23 MR. KUPETZ: Okay. 24 MR. WEAVER: I don't think there's any dispute 25 that there's a footnote, but thank you for pointing it</p>
<p>1 objection. Are you aware of that? 2 A Yes. 3 Q And you submitted a declaration in support of 4 the supplemental objection; is that correct? 5 A Correct. 6 Q And you did so as a representative of the 7 landlord; is that correct? 8 A Correct. 9 MR. WEAVER: I want to start and mark as an 10 exhibit right away, which is the original cure 11 objection. So we'll mark -- we'll mark this as Shomof 12 Number 1. 13 (Exhibit 1 marked.) 14 BY MR. WEAVER: 15 Q Mr. Shomof, I have handed you a document 16 entitled "Objection to Cure Amount" for Store 17 Number 1008 filed by the landlords that we were just 18 discussing. 19 Do you see that? 20 A Yes, I do. 21 Q And are you familiar with this document? 22 A Yes. 23 Q If I could direct your attention to paragraph 24 six of this objection. 25 A Yes.</p>	<p>1 out for the record. 2 MR. KUPETZ: Okay. 3 MR. WEAVER: I'm going to mark as Shomof 2 4 this document. 5 (Exhibit 2 marked.) 6 BY MR. WEAVER: 7 Q Now, Mr. Shomof, I've handed you a document 8 entitled "Supplemental Cure Objection and Reservation Of 9 Rights (Store Number 1008)" filed, again, by the 10 landlords that we've been discussing. 11 Do you see that? 12 A Yes. 13 Q And are you familiar with this document? 14 A Yes. 15 Q And if I could turn your attention to 16 paragraph nine, you'll see that it states "Landlord 17 asserts there are additional cure claim amounts in the 18 sum of \$5,696,046.02." 19 Do you see that? 20 A Yes. 21 Q And if you look over on paragraph 13, you'll 22 see a chart. And that chart breaks down the 23 supplemental cure amount into three categories, one of 24 which is architects, engineers, and consultants in the 25 amount of \$4,559,194.82; permit fees of \$121,851.20; and</p>

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<p>1 contractors in the amount of \$1,015,000. 2 Do you see that? 3 A Yes. 4 Q Looking at both the original and the 5 supplemental cure objection, the amounts that we've just 6 covered, are those the total amounts of cure that the 7 landlords are seeking in this dispute? 8 A As of now, yes. 9 Q Okay. Are you aware of any other cure amounts 10 that the landlords may seek in this dispute? 11 A Yes. 12 Q What are the other cure amounts that they may 13 seek in this dispute? 14 A Potentially huge losses that future profits 15 that it could have done if this thing would have gone 16 forward without -- without the negligent of Sears 17 refusing to negotiate -- or not refusing, not negotiated 18 at the time of their bankruptcy. 19 Q Is there any other additional cure that the 20 landlords may consider seeking? 21 A Not that come across my mind as of now. 22 Q Do you have any -- have you quantified the 23 amount of potential future cure amounts that you just 24 described? 25 A It's into the hundreds of millions of dollars.</p>	<p>1 building, our building, and we were replacing the HVAC 2 units with a brand-new HVAC unit for Sears in order to 3 take out the old HVAC units from inside our building, 4 not where Sears' locations are, which Sears have 5 approximately 200,000 square feet. It's above the 6 million 6,000 square feet that we own. 7 Their -- all -- all the equipment is situated 8 all along -- scattered all along the building. We 9 started installing new HVAC units, all the exterior HVAC 10 units, the compressors, condenser, and all that stuff. 11 It's already been placed on the roof of the building. 12 But going inside to put the unit itself inside the 13 Sears, we are -- everything basically ceased of us going 14 in there and getting it done. 15 Q Is there anything else Sears has failed to do 16 that has resulted in the cure amount that you're 17 claiming? 18 A Beside ceased all negotiation? I don't -- 19 nothing can come across my mind as of now. 20 Q We're going to come back to these, but we can 21 put those aside for the moment. 22 A No problem. 23 Q I want to go to -- which was Exhibit A to the 24 supplemental cure, which is The Amended and Restated 25 Building Lease from 2011, if I can show you that</p>
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<p>1 Q Do you have anything more specific? 2 A Not in -- not exactly, no. 3 Q Generally? 4 A 750- maybe. 5 Q Under the supplemental cure objection for the 6 supplemental cure amounts that the landlords are 7 seeking, what specifically has Sears not done that has 8 caused what you claim to be the 5 million-plus in cure 9 damages? 10 A What they have not done. Up until a week 11 before Sears filing for bankruptcy, we were negotiating 12 and talking about us starting construction and the 13 cooperation of Sears allowing construction to happen in 14 this space. 15 Q Uh-huh. 16 A And from that point on, at the time that they 17 declare for bankruptcy, all negotiation, all 18 conversation ceased. 19 Q And by all conversations ceased, are you 20 referring to communications with Sears or a 21 representative regarding a construction timeline? 22 A Construction timeline, allowing us to get into 23 Sears space to do what needs to be done in Sears space. 24 For example, we have done the HVAC. Some of Sears' 25 equipment are located on the upper floor of Sears, the</p>	<p>1 document. 2 MR. KUPETZ: And I -- I apologize, but is the 3 record clear that the two exhibits that have been 4 presented so far at -- for this deposition had exhibits 5 to them but those weren't included? 6 MR. WEAVER: You can clarify for the record. 7 We'll be looking at some of those exhibits today, but 8 we're not saying this is the entire submission. It's 9 just the narrative part of the objections. 10 MR. KUPETZ: I apologize if you already went 11 through that, but I -- 12 MR. WEAVER: It's not a problem. 13 MR. KUPETZ: But, you know, these were 14 understandably relatively thick documents, and now what 15 is being attached so far are the inversions that don't 16 include the exhibits. 17 MR. WEAVER: Trying to make it as workable as 18 possible with paper volume today. But we are going to 19 talk about some of those exhibits. But yes, you are 20 correct that the cure objection and supplemental cure 21 objection did have exhibits attached to them. 22 Mark this as Number 3. 23 (Exhibit 3 marked.) 24 BY MR. WEAVER: 25 Q I'm handing you what's been marked as Exhibit</p>

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<p>1 Number 3, which is entitled the Amended and Restated 2 Building Lease by and between 1039 -- I'm sorry. 3 Repeat -- 10309 Folsom, F-o-l-s-o-m, Boulevard, LP, and 4 Sears, Roebuck and Co.</p> <p>5 And if you turn to the page after the table of 6 contents, you'll see that the agreement is dated as of 7 May 5th, 2011.</p> <p>8 Do you see that?</p> <p>9 A Yes.</p> <p>10 Q Are you familiar with this document?</p> <p>11 A Probably seen it in the past.</p> <p>12 Q Do you understand this document to be the 13 building lease between the landlords and Sears?</p> <p>14 A Yes.</p> <p>15 Q Understanding that there was a 2015 amendment 16 that we'll come to.</p> <p>17 A Correct.</p> <p>18 Q But this is the governing lease document --</p> <p>19 A Yes.</p> <p>20 Q -- to the extent it does not conflict with the 21 2015 amendment; is that correct?</p> <p>22 A Yes.</p> <p>23 Q Okay. And this is still in effect today 24 subject to the amendment; is that correct?</p> <p>25 A Correct.</p>	<p>1 MR. WEAVER: I'd like to go now to -- again, 2 we're going to come back to all of them, but I want to 3 make sure we're all on the same page -- the -- what 4 would have been Exhibit C to the original cure, which is 5 the 2015 amendment.</p> <p>6 We're up to Number 4?</p> <p>7 THE REPORTER: Yes.</p> <p>8 (Exhibit 4 marked.)</p> <p>9 BY MR. WEAVER:</p> <p>10 Q I've handed you a document, Exhibit Number 4, 11 entitled "Amendment to Amended and Restated Building 12 Lease," and it notes in the preamble that it is made as 13 of December 30th, 2015.</p> <p>14 Do you see that?</p> <p>15 A Uh-huh.</p> <p>16 Q Are you familiar with this document?</p> <p>17 A Probably have seen it.</p> <p>18 Q And is this the amendment entered into between 19 the landlord and Sears concerning the building lease we 20 just discussed?</p> <p>21 A Yes.</p> <p>22 Q Okay. And I just want to make sure again 23 we're on the same page. If you can turn to paragraph 24 15, which is on page 13 of the document, Bates Number 25 0023, you see a section entitled "Existing Agreements"?</p>
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<p>1 Q I just want to turn your attention to 2 section 2, little a3, which is on page 6 of the lease. 3 And looking at -- again, obviously, you can 4 look at any part of this document that you need to, but 5 I'm focusing particularly on paragraph -- subparagraph 3 6 in the middle of this page --</p> <p>7 A Uh-huh.</p> <p>8 Q -- which states "The parties acknowledge that 9 it is most critical to the successful operation of 10 tenant's building at the premise that tenant have 11 access, use, and enjoyment of those portions of the 12 building parcel shown on the site map as, quote, 13 'tenant's control area,' including such rights as set 14 forth below without tenant's prior approval, which may 15 be withheld for any or no reason in its sole discretion. 16 "Landlord shall not construct or install any 17 improvements or make any changes to tenant's control 18 area or interfere with or obstruct tenant's use thereof 19 in any manner whatsoever, including without limitation 20 the reconfiguration of parking spaces."</p> <p>21 Do you see that provision of the lease?</p> <p>22 A Yes.</p> <p>23 Q Do you understand that that provision of the 24 lease is still active?</p> <p>25 A Yes.</p>	<p>1 A Yes.</p> <p>2 Q And you can read this full paragraph, but do 3 you agree that this paragraph states that the building 4 lease, which is Exhibit 3, still governs the 5 relationship of the parties, meaning the landlord and 6 Sears, provided that any rights or obligations under the 7 amendment, Exhibit 4, shall control the building lease 8 in the event of an expressed conflict?</p> <p>9 Do you see that?</p> <p>10 A Yes.</p> <p>11 Q Okay. So this makes clear that the building 12 lease, which was the Exhibit 3 we just looked at, is 13 still controlling as to amongst the parties unless 14 there's a conflict; correct?</p> <p>15 A I understand that.</p> <p>16 MR. KUPETZ: Just an objection to the extent 17 you're asking for a legal conclusion.</p> <p>18 MR. WEAVER: Understood. I'm asking for his 19 understanding of what he understands governs the rights 20 of the parties.</p> <p>21 THE WITNESS: Yes.</p> <p>22 BY MR. WEAVER:</p> <p>23 Q But taking a look -- and we'll just turn back 24 to page 2 of this document, Exhibit Number 4. And 25 you'll see on pages 2, 3, 4, and 5, there's a listing of</p>

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<p>1 different construction projects, replacement and 2 relocation of building systems, HVAC, plumbing, 3 et cetera. 4 Do you see that? 5 A Yes. 6 Q Okay. And looking at Number 2, which is on 7 page 2, it states at the beginning of that paragraph 8 "Landlord shall at landlord's sole cost and expense 9 design, construct, and complete all work contained 10 within this agreement in compliance with the demolition 11 and construction protocols attached hereto as made part 12 hereof as Exhibit C (including without limitation the 13 work described below in sections 3, 4, 5, 6, 7, 8, 10, 14 and 11, subject to the terms of section 9 below) on or 15 before April 1st, 2017, unless a different completion 16 date is explicitly set forth below, in which case a 17 different completion date set forth shall govern, or 18 unless a date is otherwise amended in writing by means 19 of a further amendment to this agreement." 20 Do you see that? 21 A Yes. 22 Q Did you understand that the work set forth in 23 sections 3, 4, 5, 6, 7, 8, 10, and 11, subject to 24 section 9, needed to be completed on or before 25 April 1st, 2017?</p>	<p>1 A Among -- if we're talking about this paragraph 2 here -- 3 Q Uh-huh. 4 A -- probably among many conversation that this 5 not happening in the -- in 2017 due to us not able to 6 pull permit in time. So we -- we delayed it to 2018 or 7 2019. 8 Q Do you recall a specific conversation where 9 this was discussed? 10 A We had many conversations. 11 Q Do you recall a specific conversation where 12 this was discussed? 13 A As of now, no, I don't recall. 14 Q Did you document these discussions in any way? 15 A Most likely, yeah. I would have -- if you 16 have not received those document, we have to dig them 17 out. 18 Q And how would you have documented these 19 conversations? 20 A Probably writing notes of our -- what happened 21 in our -- just like my assistant here doing now, writing 22 notes of what happened in the conversation. 23 Q But you're not aware of an actual amendment to 24 this agreement to change the timeline; is that correct? 25 A Amendment? I don't remember. I'll be honest</p>
Page 22	Page 24
<p>1 A Yes. 2 Q Was all of the work in those sections 3 completed by April 1st, 2017? 4 A No. 5 Q Was there any amendment in writing to change 6 the date beyond April 1st, 2017? 7 A I -- should be. And if it's not, probably was 8 verbal conversation with Steve or Alan. 9 Q By "Steve" who are you referring to? 10 A Steve Velkei. 11 Q And who is Steve Velkei, for the record? 12 A He's Sears' attorney. 13 Q Okay. And who's Alan? 14 A Alan Shaw, as far as I remember his name, is 15 someone that we met a few times. And he was, I think, 16 Sears' real estate or construction team, if I'm not 17 mistaken. 100 percent. 18 Q Okay. And -- and are you saying that there 19 was a written amendment to this amendment? 20 A Should be and, if not, definitely was a verbal 21 conversation among many conversation that I had with 22 Steve himself and few conversation we had with Alan 23 Shaw, Mr. Shaw. 24 Q And what were the natures of those 25 conversations?</p>	<p>1 with you. 2 Q Okay. And you mentioned the need to pull 3 permits. We're not talking, obviously, about the 4 seismic work here. To be fair, it is -- Number 8 is one 5 of those items. But for each of these items that are 6 listed, did permits need to be pulled for all of these? 7 A Yes. 8 Q Okay. And why couldn't the permits be pulled 9 before April 1st, 2017? 10 A Remember, it's a thousand units with 200,000 11 square foot of creative office and about a hundred 12 thousand square feet of retail. And that takes time, 13 more time than we anticipated. So if we exceeded the 14 time -- the time -- the 2017 time period, we most likely 15 asked for extension or made it clear that it's not 16 happening that date and it would be behind that date. 17 Q But to be clear, sitting here today, you 18 cannot identify a specific conversation where that 19 agreement was reached? 20 A As of right now at this moment? 21 Q Correct. 22 A No. 23 Q And sitting here today, you cannot point to 24 any amendment to this document? 25 A I did not look into it. I'll be honest with</p>

1 you. I have to dig further to see. 2 Q Are you aware of an amendment? 3 A Amendment? I'm not sure. 4 Q If you can look at paragraph 17, which is on 5 page 13. And section 17 is entitled "No Waiver." And 6 do you see, sir, it says "Unless expressly waived or 7 released in either the building lease or in this 8 amendment or in a separate writing signed by the waiving 9 party, no provision of either the building lease or this 10 amendment shall be deemed to be a waiver by either party 11 of any rights or claims against the other rising out of 12 the building lease as amended or out of any other 13 agreement or circumstances, including without limitation 14 those arising out of either the TBA lease or including 15 without limitation any pending City applications or 16 other zoning and/or entitlement petition requests or 17 applications initiated by the landlord." 18 Do you see that language? 19 A Yes. 20 Q Did you understand that under the terms of the 21 2015 amendment, the parties had to put into writing any 22 waiver of rights under the agreement and the amendment? 23 MR. KUPETZ: Objection to the extent you're 24 asking for any kind of legal conclusion. 25 MR. WEAVER: Asking for his understanding as a	Page 25 1 writing. 2 Q Okay. If you could turn the page to page 15, 3 section 23, which is entitled "Extensions of Time 4 Express Waiver," it states "The parties hereto may only 5 by instrument in writing extend the time for or waive 6 the performance of any obligation of the parties hereto. 7 Failure on the part of either of the parties to enforce 8 any rights which it may have against the other for the 9 other's breach of this amendment shall not constitute a 10 waiver of the said right nor shall any written waiver 11 given by a party pursuant hereto be deemed to constitute 12 a waiver of any other right not expressly waived 13 therein." 14 Did you understand under the provision of this 15 part of the amendment that the parties had to enter into 16 a written agreement to extend the times, deadlines 17 within this document? 18 A Look, I understand what it says here. 19 Q Uh-huh. 20 A But my understanding, if it happened to be, 21 which I'm not saying that it did -- if there was no 22 written extension or written agreement doesn't mean that 23 Sears or any other party's home free if it was not 24 negotiated. We were talking constantly verbal 25 conversation on how we need more time behind 2017.
Page 26 1 landlord. 2 THE WITNESS: I was under the understanding if 3 we are negotiating verbally and continuously negotiating 4 verbally that it's clear enough to understand that we 5 are still bound to one another because we are 6 negotiating. 7 If it happened to be that it was not signed on 8 an amendment, I don't think it would -- it should clear 9 Sears of all responsibilities. If they knew about it, 10 they should have asked, put it in writing. But they 11 didn't. I mean, all negotiation, that was me without my 12 attorney negotiating with Steve, which he's an attorney, 13 including Alan, that at no time it was mentioned that 14 that thing needs to be in writing. 15 BY MR. WEAVER: 16 Q So as you're -- my apologies. 17 A I was under -- I was under the understanding 18 that our negotiation is valid enough. 19 Q So what you're saying is that sitting here 20 today, you don't believe there was a writing since it 21 was never raised during those negotiations? 22 A I am not saying that. I have to look into it. 23 If there is no writing, I have to dig out why. And -- 24 and that's what I believe, that me understanding that 25 it's a verbal conversation is good enough, as good as	Page 26 1 So my belief and answer is that if there was 2 no written -- if there was no written amendment, I was 3 taking it as under the understanding that our verbal 4 conversation is good enough. 5 Q And the specific question I have for you, 6 though, is: Do you know if there was a written 7 amendment? 8 A I said I will have to dig into it and see. If 9 you guys have not received it, maybe not. But if you 10 don't have it and I don't have it, I took it as a verbal 11 agreement. It's good enough -- good enough as an 12 amendment. 13 Q There's a couple more sections of this 14 amendment to look at, Mr. Shomof. If you could turn 15 back to section 8, which is on page 4 of the document. 16 This is entitled "Seismic Work." 17 Do you see that? 18 A Yes. 19 Q Okay. And you see here that it states that 20 the landlord is responsible for all necessary seismic 21 repairs and improvements within and in the vicinity of 22 the premise in the overall building. Landlord shall use 23 best efforts to obtain necessary government permits to 24 perform such seismic repairs and improvements within 12 25 months after the City of Los Angeles's approval of

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<p>1 administrators' determination of the City applications 2 described in recital D of this amendment and complete 3 such seismic repairs and improvements within 12 months 4 of when said and complete such seismic repairs -- I'm 5 sorry -- within 12 months of when said permits are 6 issued subject to the terms of section 9 below.</p> <p>7 And if you go down to the last sentence of 8 this section, it says "The plans and specifications 9 schedule, authorized hour of construction activity, and 10 remediation plan for said seismic work shall be 11 preapproved by tenant pursuant to demolition and 12 construction protocol attached hereto as Exhibit C and 13 conducted in the manner that creates the minimum 14 possible visual and noise inconvenience to tenants and 15 its customers."</p> <p>16 Do you see that?</p> <p>17 A Yes.</p> <p>18 Q Did you understand that one of the objectives 19 of this lease was to try to minimize the impact on 20 Sears' business while this work was being done?</p> <p>21 A Yes.</p> <p>22 Q Okay. So let's turn back -- sorry for the 23 pile of documents there, but let's turn to back what I 24 believe is Exhibit 1, which is the original objection. 25 Let me know when you have that in front of you.</p>	<p>1 lists the CAM charges?</p> <p>2 A Yes.</p> <p>3 Q Okay. That number there is the same as the 4 invoice; is that correct?</p> <p>5 A Yes.</p> <p>6 Q And that invoice is the backup for that 7 charge; is that correct?</p> <p>8 A Correct.</p> <p>9 Q Okay. So this invoice is dated January 24th, 10 but the description is for the February 2019 CAM 11 charges. So the date of this invoice, were the CAM 12 charges due from Sears yet?</p> <p>13 A Repeat your question again.</p> <p>14 Q On January 24th, which is the date of this 15 invoice, 2019, were the February 2019 CAM charges due 16 and owed by Sears at that point?</p> <p>17 A I'll be honest with you. I cannot answer that 18 question. That's internal. My office, they know. I've 19 never seen those invoices before.</p> <p>20 Q So sitting here today, you don't know whether 21 on the date of this objection, in fact, those CAM 22 charges were due from Sears; is that correct?</p> <p>23 MR. KUPETZ: I'd object in terms of vague and 24 ambiguous. I'm not sure what "due" means.</p> <p>25 But go ahead.</p>
Page 30	Page 32
<p>1 A I've got it.</p> <p>2 MR. WEAVER: And, actually, can we do 3 Exhibit A. Mark that as well.</p> <p>4 Just a moment. Mark this as Exhibit 5. 5 (Exhibit 5 marked.)</p> <p>6 BY MR. WEAVER:</p> <p>7 Q So, Mr. Shomof, I've handed you what is 8 Exhibit A to the original cure objection, which is 9 Exhibit 1 for our purposes today.</p> <p>10 A This is Exhibit A or Exhibit 5? Oh, 11 Exhibit A.</p> <p>12 Q Well, it's Exhibit A to the cure objection but 13 Exhibit 5 for our purposes today.</p> <p>14 A Got it.</p> <p>15 Q So this is an invoice from East River Group, 16 LLC, to Sears dated January 1 -- or January 24, 2019, in 17 the amount of \$5,270.31 for the February 2019 CAM 18 charges.</p> <p>19 Do you see that?</p> <p>20 A Yes.</p> <p>21 Q Okay. And we need to go back and forth with 22 this and the objection. So if you'd look on -- on the 23 objection, which was Exhibit Number 1, as well. So hold 24 the -- the invoice together with going back to 25 paragraph 7 of the objection. See that chart which</p>	<p>1 BY MR. WEAVER:</p> <p>2 Q You can answer the question.</p> <p>3 A That's internal. My office, they know -- they 4 can answer that question. I -- if they were due at the 5 time of the objection, I'm not sure.</p> <p>6 Q But you understand the objection states that 7 they're due. Do you understand that?</p> <p>8 A Okay. Yeah, I understand that.</p> <p>9 Q Okay. Mr. Shomof, are you aware that Sears 10 did, in fact, pay the February 2019 CAM charges in 11 February 2019?</p> <p>12 A They did?</p> <p>13 Q Are you aware?</p> <p>14 A No, I was not aware.</p> <p>15 Q So you're not aware if Sears provided Check 16 Number 183116 to the landlords in February 2019 in 17 payment of the CAM charges?</p> <p>18 A Could very much be. No, I was not aware. No.</p> <p>19 Q It could very much be. How would --</p> <p>20 A That they paid it.</p> <p>21 Q Right.</p> <p>22 A That could very much be that I was aware. The 23 answer is no, I was not aware.</p> <p>24 Q Okay. Are the landlords still seeking the 25 February 2019 CAM charges as part of their cure demand?</p>

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<p>1 A The landlord is only seeking what he's owed. 2 If that was paid, he's not seeking it. 3 Q So if you submitted the supplemental objection 4 after the date of payment, you would have removed that 5 amount from the cure demand? 6 A If it was paid, I believe so. 7 Q And -- thank you. You can put the invoice 8 away. I think we're done with that. 9 Still on paragraph 7 of the cure objection, 10 Exhibit 1, you see the third category, the reimbursement 11 balance for Sears TI construction expense? 12 A Uh-huh. 13 Q What is that? 14 A Okay. So initially, we put, I think, as far 15 as I remember, around \$5 million witness shields. Out 16 of the \$5 million, \$2 million was for the bind of the 17 lease land. A remaining of, I think, \$3 million is for 18 TI that needed to be done. Part of it it's the HVAC and 19 on and on. 20 We have done a lot of the stuff, and some of 21 the money did come back to us. Sears reimbursed us. 22 Remaining balance for 1,000,424 we have not received. 23 That is our money that we deposited to Sears' escrow 24 account that once we complete, we get that money back. 25 MR. WEAVER: Okay. Exhibit D. We are up to</p>	<p>1 A It should be. Yeah. Exactly, no. 2 Q Fair. Not asking for an exact date. Within 3 the past 12 months, is it your understanding that this 4 work was completed? 5 A Maybe before. Maybe after. 6 Q But you understand the invoice is from 7 January 23rd, 2019 -- 8 A Yes. 9 Q -- correct? 10 A So it was completed before January 23rd. 11 Q Had you invoiced for that work previously? 12 A I have to ask my office. 13 Q Okay. You see there's an HVAC element for 14 2,600. Do you know when that work was completed? 15 Again, not precise date, but within the past year? 16 A I see HVAC for what? \$69,000? 17 Q 2,600. You see HVAC there? 18 A Oh, okay. Yeah. 19 Q Do you know when that work was completed? 20 A Don't remember. 21 Q You see Sears facade glass for 12,000. Do you 22 know when that work was completed? 23 A Within that time. Within the two years' 24 period or maybe when -- the month before that. I'm not 25 sure.</p>
<p>1 six? 2 THE REPORTER: Yes. 3 (Exhibit 6 marked.) 4 BY MR. WEAVER: 5 Q Mr. Shomof, we are handing you our Exhibit 6 Number 6, which was Exhibit D to the original cure 7 objection. And you see this is another invoice from 8 January 23rd, 2019, from East River Group, LLC, to Sears 9 Holding. 10 A Yes. 11 Q Do you see this invoice? 12 A Yes. 13 Q Do you recognize this invoice? 14 A Yes. 15 Q What is this invoice reflecting? 16 A Stuff that we have already completed. Part of 17 the \$1.4 million need to be reimbursed. 18 Q Okay. And so looking at the categories here 19 and the invoice, you've got the server room, which has 20 equipment, and IT room construction in the amount of 21 2- -- little north of \$275,000. Do you know when that 22 work was completed? 23 A I'll be honest with you. You have to ask 24 them. 25 Q Was it completed within the past year?</p>	<p>1 Q And you saw -- you also have a consultant line 2 for 30- -- just south of 33,000. Do you know when those 3 fees were incurred? 4 A I'll just give an example. 5 Q If you don't know, that's fine. I just want 6 to know if you know. 7 A No, I don't. But just I'd like -- I'd like to 8 give you an example. 9 Q Sure. 10 A We just received a \$16,000 fee from AT&T that 11 they asking us to pay. Just received it. It's not 12 included here because we didn't have it. We just 13 received it two, three days ago. A week ago? 14 Q I'm sorry, Mr. Shomof. But you've got to 15 testify. They're not on the record. I'm happy to put 16 them on the record if we want to do that after this. 17 A No. I'm just using that as -- 18 Q I came all the way from New York. I'm happy 19 to do so. But right now, it's you and me. 20 A I'm just asking you -- I'm just giving you an 21 example. So the -- to answer your question, things do 22 pop up. 23 Q Uh-huh. 24 A So I would say to that one point -- \$322,000, 25 if we paid it \$16,000, that due too.</p>

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<p>1 Q Let me ask this: Of the work that's reflected 2 in the \$32,000 on this invoice, was any of it completed 3 before April 1st, 2017?</p> <p>4 A I'm not sure.</p> <p>5 Q You're not sure.</p> <p>6 A It could be after that. Could be before that. 7 I'm not sure.</p> <p>8 Q And you had testified earlier that Sears had, 9 in fact, reimbursed you from this account previously; is 10 that correct?</p> <p>11 A They did, yeah.</p> <p>12 Q Okay. Sitting here today, you have -- let me 13 take a step back.</p> <p>14 Are there invoices that would demonstrate the 15 date of when these services were rendered or the cost 16 incurred by the landlords?</p> <p>17 A I'm not sure.</p> <p>18 Q So you don't know if you have a invoice for 19 this work?</p> <p>20 A If we invoiced Sears?</p> <p>21 Q No. If you have invoice for the work that you 22 incurred, the cost that you incurred.</p> <p>23 A Oh, I bet we do in the office.</p> <p>24 MR. WEAVER: I would ask those invoices be 25 produced in this matter since I believe those are</p>	<p>1 Q -- our Exhibit -- Number 4. Sorry. Our 2 yellow sticker Number 4. So it'd be this big one. Is 3 that the amendment?</p> <p>4 A Yeah, that's Number 4.</p> <p>5 Q Yeah, that's the one we want.</p> <p>6 A What page number you want?</p> <p>7 Q Let's go to -- I believe it's paragraph 25, 8 page 15.</p> <p>9 You see paragraph 25? This is the -- I 10 believe you were describing before the \$2 million for 11 the termination fee for the TBA lease and then the 12 3,250,000 for the construction estimate deposit; is that 13 right?</p> <p>14 A Yes.</p> <p>15 Q Okay. And you can read the whole entire 16 section. I would like to focus you on the next page, on 17 subsection D. But read as much of this as you'd like.</p> <p>18 A Just go to section D?</p> <p>19 Q Yeah.</p> <p>20 A Okay.</p> <p>21 Q It says "In the event landlord does not 22 complete the work contemplated in sections 3, 4, 6, and 23 7 by April 1st, 2017, the remainder of the funds in the 24 construction fund escrow shall be released to tenant at 25 tenant's election so that tenant can cause the work to</p>
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<p>1 responsive to our discovery requests. And we can talk 2 about that later today. I'm just noting it for the 3 record.</p> <p>4 Q But you do have an understanding under the 5 2015 amendment the work that is covered here under the 6 terms of the amendment needed to be completed by 7 April 1st, 2017?</p> <p>8 A Okay. So?</p> <p>9 Q Making sure that's --</p> <p>10 A If I'm -- what was your question again?</p> <p>11 Q You understand that the work that's reflected 12 here --</p> <p>13 A Was supposed to be done before 2017?</p> <p>14 Q April 1st, 2017. Is that your understanding 15 of what the amendment states?</p> <p>16 A Again, the amendment may say that -- that I 17 have to reply in writing. Maybe I overlooked it, but we 18 definitely replied verbally and asked for extension.</p> <p>19 Q Let -- I apologize. I didn't mean to cut you 20 off.</p> <p>21 Let's look, then, at the amendment one more 22 time. So this is --</p> <p>23 A Exhibit A again?</p> <p>24 Q It would be Exhibit A. And it's --</p> <p>25 A Page 13?</p>	<p>1 be completed, and tenant shall be entitled to payment by 2 landlord any amounts necessary to complete the work. 3 "Upon landlord's completion of the work 4 described in section 3, 4, 5, 6, 7 in a timely manner 5 and its inspection and acceptance by tenant, any 6 remaining construction estimate in the deposit funds 7 shall be dispersed to landlord subject to the review and 8 approval of the parties regarding the amount in 9 question."</p> <p>10 Do you understand this provision of the 11 amendment states if the work isn't done by April 1st, 12 2017, Sears gets the money to do with --</p> <p>13 A I would -- I would agree to that only if Sears 14 would cooperate with us doing it. But if Sears is not 15 cooperating with us doing such work where we had verbal 16 agreement that we are going to do it at a later time, 17 it's not applicable.</p> <p>18 Q I -- I understand that's your view. I just 19 want to make sure we're talking about the same thing, 20 that the agreement between the parties provides that if 21 the work isn't done by April 1st, 2017, any balance of 22 funds is then Sears'.</p> <p>23 MR. KUPETZ: I'd object to the extent you're 24 asking for a legal conclusion.</p> <p>25 MR. WEAVER: Asking for his understanding as a</p>

<p>1 landlord.</p> <p>2 THE WITNESS: Understand it, and we made it</p> <p>3 clear to Sears that if it did not happen, we made it</p> <p>4 clear to Sears that it would happen at a later time. We</p> <p>5 were not in a position of forfeiting \$1,425,000 if Sears</p> <p>6 will not cooperating with us doing the repair that needs</p> <p>7 to be done. If someone delay you to do what needs to be</p> <p>8 done in the agreement, it doesn't mean that the money</p> <p>9 goes to them automatically.</p> <p>10 BY MR. WEAVER:</p> <p>11 Q I understand that's your perspective. I'm</p> <p>12 just asking what the agreement provides --</p> <p>13 A I hope you agree with me too.</p> <p>14 Q I hope that you understand my question, which</p> <p>15 is that the agreement --</p> <p>16 A I understand the question, yeah.</p> <p>17 Q Again, we can't talk over each other. She's</p> <p>18 having a rough enough day as it is.</p> <p>19 A I apologize.</p> <p>20 Q I just want to make sure you understand that</p> <p>21 as the landlord, you signed an agreement that states</p> <p>22 that if the work is not completed by April 1st, 2017,</p> <p>23 then the money goes to Sears, the balance. That's the</p> <p>24 agreement that was signed; correct?</p> <p>25 A That -- the agreement was signed. It's</p>	<p>Page 41</p> <p>1 to prevent you from doing the work that was due by</p> <p>2 April 1st, 2017?</p> <p>3 A If we have not done it, they probably did.</p> <p>4 Q I'm not asking did they probably. Did they do</p> <p>5 something to prevent it?</p> <p>6 A Obviously, if it's not -- if it was not done.</p> <p>7 Q What did they do?</p> <p>8 A If we didn't do it, they ask us to do it at a</p> <p>9 later time.</p> <p>10 Q How -- how did they ask you? Was there</p> <p>11 e-mails? Letters? Phone conversations?</p> <p>12 A If it's not in e-mails, it's verbal</p> <p>13 conversation. I am -- again, I am more -- if you look</p> <p>14 at my e-mails, I don't -- I don't talk in e-mails as</p> <p>15 much as I talk on conversation. With Steve, we had</p> <p>16 repeatedly verbal conversations. So if it not -- if it</p> <p>17 did not happen, which I'm not saying that it did not --</p> <p>18 if it did not happen, it's only because we agreed that</p> <p>19 it would happen at a later time.</p> <p>20 Q Okay. And, again, is that agreement</p> <p>21 documented anywhere?</p> <p>22 A Again, like I said, I will on notes we</p> <p>23 definitely wrote after conversation. That's what I do</p> <p>24 just to keep my memory going. I have to go and search</p> <p>25 for notes.</p>
<p>Page 42</p> <p>1 obviously that it was signed. But in addition to that,</p> <p>2 I'm telling you that we basically straight the record by</p> <p>3 clarifying with Sears that if it did not happen by</p> <p>4 April 1st, 2017, we made it clear with Sears, with Steve</p> <p>5 Velkei and Alan and the rest of the team, that it will</p> <p>6 happen at a later time. That was agreed on.</p> <p>7 Q And you testified earlier that -- I know it</p> <p>8 relates to the supplemental cure amount, but you</p> <p>9 testified earlier that when Sears filed for bankruptcy</p> <p>10 is when there was a breakdown in negotiation and</p> <p>11 cooperation.</p> <p>12 A That was October of 2018, yes.</p> <p>13 Q So that's more than three years after the --</p> <p>14 the -- April 1st --</p> <p>15 A No. It's been a year.</p> <p>16 Q I'm sorry. A year -- a year and three months.</p> <p>17 I apologize.</p> <p>18 A No problem.</p> <p>19 Q I'm a lawyer, not a mathematician.</p> <p>20 A I'm a high school dropout.</p> <p>21 Q Okay. So, again, just so the record is clear,</p> <p>22 your testimony is that the breakdown in negotiations</p> <p>23 began in October of 2018; is that correct?</p> <p>24 A Correct.</p> <p>25 Q Prior to October 2018, did Sears do anything</p>	<p>Page 44</p> <p>1 Q Do you have anything signed by Sears</p> <p>2 representative of Sears to that effect?</p> <p>3 A Again, I will have to go search it.</p> <p>4 Q I've not seen it, sir. I will tell you that.</p> <p>5 A If you've not seen it, because we provide</p> <p>6 everything, maybe not. We don't have it. But I will</p> <p>7 double-check.</p> <p>8 Q I just also want to be clear. You talked</p> <p>9 about agreeing to timelines, but did Sears do anything</p> <p>10 that prevented you from doing the work that was due by</p> <p>11 April 1st, 2017?</p> <p>12 A If it did not -- and I repeat again. If it</p> <p>13 did not happen, most likely that they ask for delays.</p> <p>14 They ask to do it at a later time.</p> <p>15 Q I understand, sir. I'm asking you as a</p> <p>16 representative of the landlord in this dispute, did</p> <p>17 Sears do anything to prevent the landlord from</p> <p>18 satisfying its obligations under the 2015 amendment?</p> <p>19 A Now, how can I be more clear than what I am</p> <p>20 saying? If it did not happen, most likely Sears ask us</p> <p>21 to do it at a later time.</p> <p>22 Q Sitting here today, though, you cannot</p> <p>23 articulate a specific thing that Sears did to prevent</p> <p>24 you from doing the work by April 1st, 2017?</p> <p>25 A Well, Sears did a lot of things specifically</p>

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<p>1 that were not right --</p> <p>2 Q I'm looking --</p> <p>3 A -- that I -- it can't come across my mind.</p> <p>4 But, I mean, we're not here to clear Sears that they've</p> <p>5 not done anything. They've done a lot of things not</p> <p>6 correctly. That's why we sitting here over.</p> <p>7 Q And that's what I'm asking for, sir. Those</p> <p>8 things. We can't just say "those things."</p> <p>9 A Again, like I said --</p> <p>10 Q Let me finish the question, sir.</p> <p>11 A Apologize.</p> <p>12 Q I need to know -- this is a deposition. I</p> <p>13 need to know the specific things that you're claiming</p> <p>14 they did.</p> <p>15 A If you are sitting over here and asking me to</p> <p>16 give it to you right now, as it is now, it cannot come</p> <p>17 across my mind. I have to go and dig it out.</p> <p>18 Q You understand you are testifying today as a</p> <p>19 representative of the landlord; is that correct?</p> <p>20 A Most definitely, yes.</p> <p>21 Q And you understand one of the disputes in this</p> <p>22 case is whether or not the landlord performed under the</p> <p>23 lease and whether or not Sears performed under the</p> <p>24 lease; is that correct?</p> <p>25 A Correct, yes.</p>	<p>1 Q Nothing in substance about this deposition?</p> <p>2 A Not at all.</p> <p>3 Q In the car ride over, what did you talk about?</p> <p>4 A With Jonathan?</p> <p>5 Q Yes.</p> <p>6 A We talked about -- he's -- he's building a</p> <p>7 house, so probably his house development.</p> <p>8 Q If I wasn't clear, I'm sorry. Specific to</p> <p>9 this deposition, what did you speak about?</p> <p>10 A I don't -- I don't remember speaking about</p> <p>11 that much at all.</p> <p>12 Q Okay. It was only a few hours ago. So</p> <p>13 what -- what specifically do you remember speaking about</p> <p>14 with Jonathan on the car ride here about the deposition?</p> <p>15 A Telling him you should attend and write notes.</p> <p>16 And if there's any document that I'm missing, maybe you</p> <p>17 can pull it out. That's what I probably told him.</p> <p>18 MR. WEAVER: We've been going about an hour</p> <p>19 and 15. You want to take a quick break?</p> <p>20 MR. KUPETZ: You want a break?</p> <p>21 THE WITNESS: I'm okay to continue, but --</p> <p>22 MR. KUPETZ: Whatever you --</p> <p>23 THE WITNESS: -- if you're asking for a break,</p> <p>24 I don't mind.</p> <p>25 MR. WEAVER: I didn't note at the beginning</p>
Page 46	Page 48
<p>1 Q Mr. Shomof, what did you do to prepare for</p> <p>2 today's deposition?</p> <p>3 A Not much.</p> <p>4 Q Did you look at any documents?</p> <p>5 A Oh, browsing through them.</p> <p>6 Q Did you meet with anyone?</p> <p>7 A No.</p> <p>8 Q You did not meet with counsel?</p> <p>9 A Fifteen minutes before you -- before this. I</p> <p>10 just met with him.</p> <p>11 Q Prior to today, did you meet with counsel to</p> <p>12 prepare for the deposition?</p> <p>13 A No. I just met him today, my beautiful</p> <p>14 attorney here.</p> <p>15 Q I'm sure he appreciates that.</p> <p>16 Did you meet with your office, personnel from</p> <p>17 your office, in preparation for today's deposition?</p> <p>18 A This morning, I met -- for five minutes, I met</p> <p>19 with Ericson. And I drove Jonathan here.</p> <p>20 Q Okay. And your five minutes with Ericson this</p> <p>21 morning, what did you guys talk about?</p> <p>22 A I told him go get dressed because you're going</p> <p>23 to be attending.</p> <p>24 Q Okay. What else did you talk about?</p> <p>25 A That's all.</p>	<p>1 that any time you want a break, so I thought --</p> <p>2 THE WITNESS: I'm cool.</p> <p>3 MR. WEAVER: But if you're fine, I'm happy to</p> <p>4 keep going.</p> <p>5 Okay. Let's let the most important person in</p> <p>6 the room have a quick break. We're off the record.</p> <p>7 (Brief recess.)</p> <p>8 MR. WEAVER: Back on the record.</p> <p>9 Q Mr. Shomof, during our break, did you look at</p> <p>10 any documents, either electronic or hard copy?</p> <p>11 A Yes.</p> <p>12 Q Okay. Did any of those documents refresh your</p> <p>13 recollection about the topics we were discussing this</p> <p>14 morning?</p> <p>15 A Yes.</p> <p>16 Q What were those documents?</p> <p>17 A So speaking about the paragraph that says if</p> <p>18 after April 1, 2017, the money get wiped out if the job</p> <p>19 is not going to completed, just to show that there was</p> <p>20 many, many verbal conversation, the payment that we</p> <p>21 got -- big amount of the payment that we got out of the</p> <p>22 three-something million dollars owed to us leaving us</p> <p>23 with a \$1.4 million occurred after April 1st, 2017. Did</p> <p>24 you know that?</p> <p>25 Q And which document were you looking at to</p>

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<p>1 refresh your recollection of that?</p> <p>2 A I -- we called the office, and we asked our 3 office when was the payment made.</p> <p>4 Q Do you know when the -- those costs were 5 submitted to Sears?</p> <p>6 A No. I did not look into that --</p> <p>7 Q I'll submit to you that those costs were 8 submitted to Sears prior to April 1st, 2017.</p> <p>9 A So all costs -- so took them four, five months 10 to pay us back the money?</p> <p>11 Q My understanding is the cost that you're 12 referring to. But, again, I wasn't on the phone call, 13 so I can't understand --</p> <p>14 A Well, then we have to -- we have to find out 15 exactly when it was submitted.</p> <p>16 Q And you understand also, Mr. Shomof, when we 17 discussed earlier the nonwaiver clause of the agreement 18 which states that none of the parties waive a right they 19 have under the agreement unless in writing, do you 20 remember that as well?</p> <p>21 A Yes, you did mention that.</p> <p>22 Q Not just mentioned it. It's in the agreement 23 that you signed; correct?</p> <p>24 A Okay.</p> <p>25 Q Any other documents that you saw that</p>	<p>1 Q It should have been subtracted.</p> <p>2 A (Witness nods head.)</p> <p>3 MR. WEAVER: Let's mark your declaration.</p> <p>4 Up to seven?</p> <p>5 THE REPORTER: Seven.</p> <p>6 (Exhibit 7 marked.)</p> <p>7 BY MR. WEAVER:</p> <p>8 Q Mr. Shomof, I've handed you what we've marked 9 as Exhibit Number 7, which is your declaration in this 10 matter. Do you recognize this document?</p> <p>11 A Yes.</p> <p>12 Q Okay. And this is the document you submitted 13 as a representative of the landlord; is that correct?</p> <p>14 A Yes.</p> <p>15 Q If you can turn to paragraph 6 on page 2, here 16 you discuss how prior to the commencement of the 17 bankruptcy cases that the landlord was in discussion 18 with tenant for the planned rehabilitation.</p> <p>19 Do you see that?</p> <p>20 A Yes.</p> <p>21 Q What were the nature of those discussions 22 prior to commencement of the bankruptcy case?</p> <p>23 A Us doing the repair. The TI needs to be -- to 24 get done at Sears space and the seismic retrofit.</p> <p>25 Q Okay. When did the discussions begin with</p>
Page 50	Page 52
<p>1 refreshed your recollection?</p> <p>2 A No. That's what we talked about.</p> <p>3 Q Okay. If you could pull -- you can put away 4 the -- the -- for a moment or for now the lease and the 5 amendment. I want to go back to the supplemental 6 objection, which is Sticker Number 2.</p> <p>7 A Okay.</p> <p>8 Q And, again, if you'd turn to page 4, 9 paragraph 9, we talked before about these numbers --</p> <p>10 A Uh-huh.</p> <p>11 Q -- the 5.7 and the 7.1 total; correct?</p> <p>12 A Yes.</p> <p>13 Q Okay. I'll represent to you -- you can do the 14 math if you want -- if we take the supplemental cure 15 amount, the 5.7, out of the total, 7.1, it equals the 16 amount of the original cure amount that you submitted. 17 So --</p> <p>18 A I didn't get it.</p> <p>19 Q The supplement plus the original equals 7.1.</p> <p>20 A Okay.</p> <p>21 Q Okay. So I understand that to mean that the 22 landlord is still seeking cure payment for the 23 February 2019 CAM charges because the number didn't 24 change. Is that the landlord's position?</p> <p>25 A If it was paid, it should be subtracted.</p>	<p>1 Sears about those topics?</p> <p>2 A I don't remember the exact dates.</p> <p>3 Q Was it a year before the bankruptcy case was 4 filed?</p> <p>5 A Probably before. I mean, all along, we were 6 negotiat- -- I was negotiating and talking to Steve.</p> <p>7 Q And specific about the seismic retrofit, when 8 did those discussions begin?</p> <p>9 A I don't remember exactly, but I would say 10 probably sometime -- started probably 2018.</p> <p>11 Q Okay.</p> <p>12 A Maybe even 2017. I'm not sure.</p> <p>13 Q Okay. And at the time of the commencement --</p> <p>14 A I'll go back.</p> <p>15 Q Please.</p> <p>16 A It should have been prior to April 1, 2017.</p> <p>17 So yes, the reason is I'm saying that it's prior, it's 18 because we did not complete the work because the deal 19 was with the negotiation that occurred with Sears that 20 why finish up the HVAC now. Why don't you do it when 21 you guys are going to be doing the seismic retrofit so 22 you going to be there all at one time.</p> <p>23 Q And who was that discussion with?</p> <p>24 A In particular, I'm not sure. Maybe Steve.</p> <p>25 Most likely Steve because I think most of the stuff was</p>

Page 53	Page 55
<p>1 going through Steve.</p> <p>2 Q And when did that conversation occur?</p> <p>3 A Should be prior to 2017.</p> <p>4 Q But you don't -- sitting here today, you don't recall when?</p> <p>5 A Not exactly. Pinpoint exactly, no.</p> <p>7 Q Okay. What else was discussed as part of those negotiations?</p> <p>9 A The overall -- the overall project. The seismic retrofit, the HVAC, all the work that needs to be done.</p> <p>12 Q Prior to the commencement of the bankruptcy, what was the status of those discussions? Where did things stand?</p> <p>15 A Where did it stand. The last conversation that we had with Sears prior -- prior to the bankruptcy is us asking Sears -- asking Sears to basically allow us to work in the space for a period of six months.</p> <p>19 Q And by work in their space, you mean for Sears to close for those six months?</p> <p>21 A Correct.</p> <p>22 Q And we'll get to that. There's a letter we'll get to today, but that was in September of 2018 I'll represent to you. I'll show you the letter today.</p> <p>25 A Well, no. It's not only in the letter. We</p>	<p>1 Q Uh-huh.</p> <p>2 A That's what was discussed.</p> <p>3 Q I understand that you have the letter in September.</p> <p>5 A Yes.</p> <p>6 Q I'm asking prior to that --</p> <p>7 A We summarized the conversation in that letter.</p> <p>8 Q Okay.</p> <p>9 A The conversation occurred prior to September talking about what we -- what was mentioned in the letter.</p> <p>12 Q Okay. So prior to September 2013, you had requested that Sears shut down for six months?</p> <p>14 MR. KUPETZ: I don't think you mean 2013.</p> <p>15 MR. WEAVER: I'm sorry. 2016. Thank you.</p> <p>16 Q September 2018, you had requested that -- start again so it's clear.</p> <p>18 Prior to September of 2018, you had requested that Sears shut down --</p> <p>20 A Yes.</p> <p>21 Q -- for six months?</p> <p>22 A Yes.</p> <p>23 Q When?</p> <p>24 A Months before.</p> <p>25 Q Months before?</p>
Page 54	Page 56
<p>1 had few meetings with Steve and Alan Shaw at Steve's office talking about it verbally. And then we had other meetings with Steve and the -- I forgot the other guy's name. You mind if I ask?</p> <p>5 Q I'm sorry.</p> <p>6 A No? That's no problem.</p> <p>7 Q Again, I'm happy to depose them if they want to sit --</p> <p>9 A There was another guy with them -- I don't recall his name -- at Sears department store itself. They had a conference room in there that we were sitting down in a conference room. That's prior -- that's prior to the bankruptcy.</p> <p>14 Q All right. Was that meeting also in September before the letter was sent?</p> <p>16 A Before the letter was sent, I believe.</p> <p>17 Q Right. And during -- and I want to come again back to that meeting, but prior to September of 2018, when did you begin discussing a schedule for the seismic retrofit, if at all?</p> <p>21 A We did definitely discuss prior to September.</p> <p>22 Q And I want to know what those discussions were, the details, the specifics. What was discussed? What was proposed? What were the issues?</p> <p>25 A We put it in writing at a later time.</p>	<p>1 A Yes.</p> <p>2 Q And that was never put in writing until September 2018?</p> <p>4 A There was twice. One time at Steve's office --</p> <p>6 Q Uh-huh.</p> <p>7 A -- with Alan. And the second time it was with the other guy's name, which I don't recall his name --</p> <p>9 Q Okay.</p> <p>10 A -- at Sears department store.</p> <p>11 Q And what I'm trying to get a sense of, Mr. Shomof, is when those discussions took place. It's different if it took place --</p> <p>14 A I would say --</p> <p>15 Q Let me -- let me finish the question, please, sir.</p> <p>17 It's different if the conversation took place a month or two before the letter or a year before the letter.</p> <p>20 A No.</p> <p>21 Q I'm trying to understand the timing of these conversations.</p> <p>23 A I wouldn't say a year before the letter. I would say probably two, three months prior to the letter.</p>

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<p>1 Q Okay. And the request from the landlord was 2 for Sears to close for six months?</p> <p>3 A Yes. Well, my recollection came back. The 4 one meeting with Alan Shaw at Sears -- at Steve's office 5 occurred maybe a couple months before --</p> <p>6 Q Okay.</p> <p>7 A -- the letter. And the second meeting with 8 the name that I don't remember, Steve and the other 9 guy's name, the letter came within a couple of days 10 after the -- after the meeting.</p> <p>11 Q Okay. And regarding the meeting at Steve's 12 office, what was the reaction to the proposal of Sears 13 closing for six months?</p> <p>14 A It's doable, but it may cost you. That's what 15 they said.</p> <p>16 Q Okay. And that was the end of the 17 conversation?</p> <p>18 A He says why don't you put it in writing in 19 detail, specify exactly what you're looking for --</p> <p>20 Q Okay.</p> <p>21 A -- and we'll reply. And that's what we did.</p> <p>22 Q And that request was made in the meeting in 23 Steve's office?</p> <p>24 A The first time -- the first time I mention 25 about closing the whole place during the work at one</p>	<p>1 to be done. So the other guy which I don't remember his 2 name said it's doable, but it will cost.</p> <p>3 Q So someone who you don't remember who it was 4 said it's doable, but it will cost?</p> <p>5 A Yes.</p> <p>6 Q Did you offer any compensation during that 7 meeting?</p> <p>8 A I did say the amount of me contributing to 9 doing the seismic retrofit, it's a great -- it's a great 10 cost that costing me over 30 million -- no. Wait a 11 minute. 30 million for concrete, \$20 million for steel. 12 \$50 million that will enhance Sears' lease. I explained 13 that to them in detail. I said that is the compensation 14 that I'm willing to give you guys is seismic retrofit. 15 You guys need to realize the benefit that Sears is going 16 to be getting out of that seismic retrofit.</p> <p>17 Q And, Mr. -- I apologize.</p> <p>18 A If you guys will not allow me to do that 19 seismic now, it's a loss for us and future loss for 20 Sears because eventually, we have to get it done.</p> <p>21 Q Mr. Shomof, you understand that you signed an 22 agreement that said it was your cost and expense to do 23 the seismic retrofit; correct?</p> <p>24 A Correct. Yes.</p> <p>25 Q So it was your cost, it was your obligation</p>
Page 58	Page 60
<p>1 time within six months is with Alan at Steve's office, 2 as far as I remember.</p> <p>3 Q Okay. And I want to know about that 4 conversation. I want to know the reaction, what was 5 said to you, and what came out of that meeting.</p> <p>6 A Again, it's doable. I don't remember in 7 detail what happened in that particular meeting. But we 8 talked about it. The details, I just don't remember.</p> <p>9 Q And your recollection is that that meeting 10 took place a few months prior to the letter being 11 drafted?</p> <p>12 A Probably a month or two before.</p> <p>13 Q A month or two before.</p> <p>14 Q And there was a second meeting?</p> <p>15 A We asked for Steve -- for Alan Shaw to come, 16 and Alan Shaw was laid off or quit from the company, as 17 far as my recollection.</p> <p>18 Q But there was a second meeting at the 19 conference room at the Sears location?</p> <p>20 A Correct.</p> <p>21 Q And what happened during that meeting?</p> <p>22 A So we said we are getting closer. We need to 23 finalize the agreement of us going to Sears' space. And 24 we said that we needed Sears to be shut down for that 25 period of time over that period, that that's what needs</p>	<p>1 under the amendment to do the seismic retrofit; correct?</p> <p>2 A Right. Correct.</p> <p>3 Q And you also understand under that very same 4 agreement that you were to endeavor to do the 5 construction in the least disruptive manner to Sears; is 6 that correct?</p> <p>7 A Correct. Yes.</p> <p>8 Q And is shutting down for six months the least 9 disruptive manner for Sears without any compensation?</p> <p>10 A And then again, that's how I explained it. If 11 you guys prevent me from doing so, it will be a loss for 12 Sears.</p> <p>13 Q Okay.</p> <p>14 A What would be the loss for Sears -- and that's 15 what I was trying to clarify to them. I'm not going to 16 doing the seismic retrofit. The value of Sears' lease 17 will diminish.</p> <p>18 Q I understand that that's your view, 19 Mr. Shomof.</p> <p>20 A That's --</p> <p>21 Q I'm asking about the obligations under the 22 lease and the amendment. Under the lease and the 23 amendment, you have an obligation to do the seismic 24 retrofit; correct?</p> <p>25 A Correct. And I already admit -- agreeing to</p>

1 what I said. 2 Q And under the lease and amendment, there's no 3 obligation for Sears to close for six months; correct? 4 A Absolutely not. 5 Q Okay. So I understand that you believe 6 there's value for Sears. Fine. 7 But what I'm trying to understand is what 8 Sears has done that is in breach of the amendment or the 9 lease by not shutting down for six months. That's what 10 I'm trying to understand. 11 A All they could have done is continue 12 negotiating with me and says, Izek, work around us. 13 We're allowing to give you the space what the lease 14 says. We are not going to shut down. And if they would 15 have said that, I would have maneuvered the whole 16 situation and tried to work with my general contractor 17 that is going to be doing the job to work within Sears' 18 space and not asking them to shut down. The problem 19 with it occurred that they just stopped negotiating, 20 stopped talking to us due to Sears' bankruptcy. 21 Q I understand that's your view. I'm just 22 asking specifically as it relates to the obligations 23 under the lease and the amendment. And as I understand 24 it, you made one proposal, as you testified today, that 25 Sears shut down for six months without any compensation;	Page 61 1 happen? 2 A Propose to who? 3 Q To Steve. 4 Did -- 5 A When Steve's telling me no one to talk to -- 6 Q Mr. Shomof, can you please answer my question. 7 Did you at any time provide an alternative proposal 8 other than shutting down for six months without 9 compensation? It's a yes-or-no question. 10 A I was trying to, and Steve told me flat out no 11 one to talk to. 12 Q I'm not asking you what Steve told you. I'm 13 asking whether you and the landlord made any other 14 proposals. It's a yes-or-no question, sir. 15 A Proposal, no. Attempt to make proposal, yes. 16 Q Okay. And what was the proposal you wanted to 17 make? 18 A Let's talk about how we going to get it done, 19 if it needs to be partially doing it or you guys willing 20 to close down. 21 Q Was it a condition for your construction 22 financing that Sears close down for six months? 23 A It was a -- they want to see some kind of an 24 agreement. 25 Q Was it a condition of your proposed
Page 62 1 is that correct? 2 A I asked Sears to shut down, and they asked 3 me -- they said it will cost you. And I says I'm 4 already contributing a lot to this. And if they would 5 have said definitely it will cost you "X" amount of 6 dollar, I would -- may say okay. I have no choice. I 7 need to get it done. 8 But the point -- the whole point here, it's 9 not about Sears wanting money and I said no and that's 10 when it fell apart. It's that Sears did not say it will 11 only need to be with money. Sears did not say you can 12 only do it partially or otherwise do it partially. I 13 would -- I would revisit the whole situation and just do 14 it partially, if needed. 15 Q Did you make any proposal other than Sears 16 shutting down for six months without compensation? 17 A There was no one to talk to. I mean, it's 18 basically Sears. I spoke to Steve repeatedly, and Steve 19 says, Izek, I have no one to talk to. 20 Q I understand that your view is that there was 21 no one to talk to and Steve told you there was no one to 22 talk to. My question is whether or not when talking to 23 Steve or talking to anyone, you proposed any other 24 solutions rather than shutting down for six months 25 without any compensation. "Yes" or "no," did that	Page 62 1 construction financing that Sears shut down for six 2 months? 3 A The answer is they wanted to see some kind of 4 an agreement. 5 Q And what was the condition of that agreement? 6 What did it need to say? 7 A You need to provide us an agreement with Sears 8 that they will allow you to do the seismic retrofit. 9 And at the same time, we want to see from the general 10 contractor if it going to be partially, we want to see 11 the general contractor can get the job done, the overall 12 job done, because it was a 36-months construction. 13 So if we would have known that it's a 14 definitely no, no with Sears shutting down for six 15 months, we would go the route of doing it partially. We 16 will talk to the general contractor that this job needs 17 to be done partially. And I would ask for Sears to 18 let's make a -- the agreement stating that we are going 19 to go in with -- eight months in and out or a year in 20 and out. But when Sears refuse to talk and no one to 21 talk to, that's where the whole thing fell apart. 22 Q Mr. Shomof, did you ever tell your contractor 23 to develop a plan that would -- 24 A Yes. 25 Q -- require -- let me finish the question,

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1 please.	1 A Yeah. We had that all along because that's
2 Develop a plan to be able to do the seismic	2 what the lease says. The lease says that we are
3 retrofit without Sears closing down?	3 entitled to go into Sears' space in partial. So we
4 A Yes.	4 approached Sears to save time. We told Sears instead of
5 Q Okay. When did you ask your contractor to do	5 it taking 12 months being in Sears, let us shut down --
6 that?	6 18 months. Shut down for 6 months, and let us finish it
7 A Way before us talking to Sears doing it --	7 up within 6 months.
8 shutting down.	8 Q I understand.
9 Q Okay.	9 And just so I understand your testimony, it's
10 A So we have a plan for shutting it partially --	10 that you were asking for something that you were not
11 for working partially.	11 entitled to under the lease; correct?
12 Q Have you ever provided that plan to Sears?	12 A Yes.
13 A I believe -- I believe we did.	13 Q Okay. In paragraph eight of your declaration,
14 Q You did? When?	14 it says that as of March 16, 2019, and prior thereto, as
15 A I believe. I'm not sure.	15 communicated by the landlord to tenant, landlord has
16 Q Okay.	16 been ready, willing, and able to commence the necessary
17 A If we didn't, it's -- we have to look for it.	17 renovation construction at the building.
18 Q This plan was done prior to your discussion	18 A Okay.
19 about shutting down for six months?	19 Q In what ways was the landlord ready, willing,
20 A Yes.	20 and able? And I assume you're focused here on the
21 Q So at the time when you had the discussion	21 seismic retrofit.
22 with Sears about shutting down for six months, you had	22 A Yes.
23 an alternative plan prepared?	23 Q In what ways was the landlord ready, willing,
24 A Yes, but the alternative plan would be costly.	24 and able?
25 Q Costly to whom, sir?	25 A As far as I remember, at that date the
Page 66	Page 68
1 A Time-wise costly.	1 landlord did not pull out. So we were ready and willing
2 Q Understood.	2 to go forward. And I believe by that time, we already
3 A To the development.	3 had our seismic retrofit permits on hand.
4 Q To the development. Understood.	4 Q You did? As of what date?
5 That cost would have been borne by you;	5 A I believe maybe a week or two prior to that
6 correct?	6 date.
7 A Yes.	7 Q Of which -- March 16?
8 Q So when Sears during those meetings that you	8 A March 16.
9 referenced said it's doable but will cost you, you did	9 Q Okay.
10 not counter with the proposal of a more limited shutdown	10 A The reason is as far as my recollection, the
11 that would have included more costs for the landlord;	11 expiration of our entitlement would have been March 16.
12 correct?	12 And we were able to salvage our entitlement by us
13 A Well, if I heard -- if I heard the price of	13 pulling the permits. So probably a couple weeks before
14 what costly, I would probably counter back. But it just	14 that.
15 went. It ceased. All conversation ceased right there	15 Q So prior to -- let's just say into February,
16 and then.	16 early March of 2019, you had not pulled the permits for
17 Q I understand.	17 the seismic retrofit; correct?
18 A Because Sears did go into bankruptcy within a	18 A Sometime in February, we pulled the permits.
19 week or two after we had that meeting.	19 Q In February. Prior to that, you had not
20 Q Correct.	20 pulled the permits?
21 I just want to make sure I understand the	21 A No, we had not.
22 facts, which is that at the time you asked Sears to shut	22 Q And the amendment was signed in 2015; correct?
23 down for six months with no compensation, you had	23 A If it says that, yes.
24 supposedly an alternative construction plan in place;	24 Q Okay. Did you have as of March 16, 2019,
25 correct?	25 construction financing in place?

Page 69	Page 71
<p>1 A Repeat your question again. 2 Q As of March 16, 2019, did you have 3 construction financing in place? 4 A As of March, they did not pull out on that 5 date or before. I don't remember exactly when they 6 pulled out. 7 Q The answer's no, you did not have construction 8 financing in place? 9 A That's not what I -- my answer is, no. 10 Q Did you ever have construction financing in 11 place for this project? 12 A What do you mean by "in place"? Completely 13 done, ready to be funded? 14 Q Committed financing. 15 A Committed, yes. 16 Q "Committed" meaning you could draw upon the 17 financing? 18 A No. That's not -- we had condition that we 19 had to meet. And one of the last condition, it was us 20 getting some kind of an agreement with Sears. 21 Q We'll come back to the checklist and the open 22 conditions that existed in October 2018. 23 But when did you first begin to seek 24 construction financing for this project? 25 A Probably six months prior. Maybe even before.</p>	<p>1 Q And when was the engineering finalized? 2 A Probably a week before, two weeks before we 3 got the permits. 4 Q So were you -- was the landlord ready, 5 willing, and able to begin construction for the seismic 6 retrofitting in October of 2018 when Sears filed for 7 bankruptcy? 8 A No. 9 Q Okay. 10 A If you don't mind, I will -- I pull out the -- 11 I want to retrieve the answer no. And repeat the 12 question again. I want to make sure I understood it. 13 MR. WEAVER: May you please repeat the 14 question. 15 (Record read.) 16 THE WITNESS: No. No. As far as I remember, 17 we had some minor issue with the seismic, but we were 18 able to finalize it with that time, more or less. 19 BY MR. WEAVER: 20 Q You said that the permits were pulled in 21 February of 2019? 22 A Yeah, right at that time, we were waiting 23 for -- 24 Q Is that when the landlord, in your mind, was 25 ready, willing, and able to begin the construction?</p>
Page 70	Page 72
<p>1 Q And how long, in your experience, does it take 2 to obtain construction financing for a project like 3 this? 4 A Six months. 5 Q So you began seeking construction financing 6 six months prior to when you thought that your 7 entitlements may expire; is that correct? 8 A I have to look at the document exactly when we 9 reached out for construction financing. 10 Q Okay. 11 A We talked to many lenders, but that particular 12 lender, that's the one we chose to go forward with. I 13 think it's six or seven months prior -- no. Even more. 14 Even longer. I have to look into the document the exact 15 dates. 16 Q Is there a reason you didn't begin to seek 17 construction financing in 2017? 18 A Yeah. We had issue with -- with the plans. 19 We were ready and then the plan checker came up with 20 comments in regard to the entitlement with regards to 21 the seismic retrofitting. And the engineer needed to 22 redesign the whole -- reengineer the whole situation. 23 So that's what delayed the whole project. 24 Architecturally, it was already done, but the engineer 25 was not 100 percent.</p>	<p>1 A Well, then -- no. We were willing -- well, 2 let me correct it here again. We could have started 3 staging. We were not able to pull the permit up until 4 late January or so. Sometime mid-January. So we could 5 have -- we were ready to stage, and everybody was lined 6 up to stage the project, put out the cranes, and 7 basically break ground in a way. But, actually -- I 8 have to check the record. Early 2019, we were done. 9 Q That's my question. So early 2019, your view 10 is that the landlord was ready, willing, and able to do 11 the seismic retrofitting work? 12 A I would say probably, yeah. Probably January, 13 everything done. 14 Q Okay. Was the only outstanding item -- 15 condition -- was the only outstanding condition for your 16 construction financing an agreement with Sears in early 17 2019? 18 A No. Under conditions which were very minor 19 and addressable, that's not 2019. That occurred way 20 prior on the condition of the construction loan. The 21 construction loan could have been done probably 22 September, October of 2019 -- '18. 23 Q I understand. But I'm asking you -- 24 A That was -- the only conditions was -- there 25 was couple of other minor conditions that it was doable</p>

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<p>1 and not an issue.</p> <p>2 Q So, Mr. Shomof, your answer is that an 3 agreement with Sears was not the only condition at the 4 beginning of 2019 to you closing your construction 5 financing; correct?</p> <p>6 A No. There was other conditions but very 7 minor. It's -- I would even not consider it as a big 8 deal at all.</p> <p>9 Q They were conditions you had not satisfied; 10 correct?</p> <p>11 A Satisfied the lender?</p> <p>12 Q Correct.</p> <p>13 A We were in the process of satisfying him.</p> <p>14 Q But you had not satisfied them at the 15 beginning of 2019; is that correct?</p> <p>16 A No. Not -- don't go 2019. I'm talking about 17 September of 2018.</p> <p>18 Q I'm asking the question, Mr. Shomof. You said 19 in response to your answer [sic], which was that you 20 were ready, willing, and able to do the seismic retrofit 21 at the start of 2019. That was your testimony; correct?</p> <p>22 A Yes.</p> <p>23 Q My question is: At that very time, did you 24 have open conditions to close on your construction 25 financing other than an agreement with Sears? It's a</p>	<p>1 another, one minor one.</p> <p>2 Q Mr. Shomof, in paragraph 9 of your 3 declaration, you see the chart of the supplemental cure 4 amounts; correct?</p> <p>5 A Yes.</p> <p>6 Q From the category of architects, engineers, 7 and consultants, when did that -- when did you incur -- 8 over what time period did you incur those \$4.5 million 9 charges and expenses?</p> <p>10 A From the day we started with architectural 11 engineering.</p> <p>12 Q And when was that?</p> <p>13 A I don't remember the exact date. Sometime 14 2015 maybe.</p> <p>15 Q For the permit fees of 121,000, over what time 16 period did you incur those expenses?</p> <p>17 A Along the way. From 2000- -- there was some 18 demolition permitting. There is other permits. And the 19 seismic retrofit permit, I think it was sometime in 20 February of 2019.</p> <p>21 Q And the contractors, the million that you have 22 there, what time period did you incur those expenses?</p> <p>23 A From 2015 on. Demolition and all that kind of 24 stuff.</p> <p>25 Q So did -- did -- let me step back.</p>
Page 74	Page 76
<p>1 yes-or-no question.</p> <p>2 A I have to revisit it again.</p> <p>3 Q You just testified a few moments ago that you 4 did have open -- you called them minor, but you said 5 there were open conditions.</p> <p>6 A If anything, there was one minor thing. I 7 think the general contractor -- which I already signed 8 up another general contractor, which is -- that's not a 9 condition. It's a done deal. The only thing that was 10 holding us is basically Sears' agreement.</p> <p>11 Q Okay. Just I want to be -- your testimony 12 today under oath is that the only condition to you 13 closing your construction financing at the start of 2019 14 was an agreement with Sears. That's it?</p> <p>15 A If there was any other condition, it was very 16 minor.</p> <p>17 Q That wasn't my question, Mr. Shomof. 18 My question was: Is it your testimony today 19 under oath that the only condition to you closing your 20 construction financing at the start of 2019 was an 21 agreement with Sears? It's a yes-or-no question. If 22 you don't understand the question, I will try to make it 23 more simple.</p> <p>24 A No. I understand the question. I just don't 25 remember it exactly in detail. Most likely there was</p>	<p>1 Is the -- the 5 million that you're seeking as 2 a supplemental cure amount related to the seismic 3 retrofitting project or overall construction?</p> <p>4 A It's not overall construction. It's demoing. 5 It's mostly abatement of all the asbestos and all that 6 kind of stuff.</p> <p>7 Q So you began working on the project in 2015?</p> <p>8 A Yes.</p> <p>9 Q Okay. And were there any issues that occurred 10 resulting from your construction work that interrupted 11 Sears' business during that time period?</p> <p>12 A I think once or twice.</p> <p>13 Q Once or twice.</p> <p>14 Mr. Shomof, we discussed this condition as to 15 an agreement with Sears related to your construction 16 financing.</p> <p>17 What was the specific condition that you 18 needed to satisfy as it related to an agreement with 19 Sears?</p> <p>20 A We -- they wanted to see -- they were afraid 21 that this job will take behind three years. And they 22 understood, which I raised that issue, telling them that 23 with our general contractor, the guy that was going to 24 be doing the seismic retrofitting and all that stuff, he 25 want to do it within six months, be in Sears and out.</p>

1 And they said do you have an agreement with 2 Sears. And I said the agreement that we do have with 3 Sears and which they've seen the lease, it state that 4 they -- we can do it in partial. And they said can you 5 obtain an agreement from them on doing the whole thing 6 at one time within six months. And I said I am working 7 on it with Sears. 8 And at the time, when we got closer, when we 9 was told the final of September or October of 2018 -- 10 that's when Sears filed for bankruptcy -- we just told 11 them that Sears filed for bankruptcy, which they knew, 12 and I said I have no one to negotiate it with. 13 So every conversation with repeatedly meeting, 14 like, once-a-week conference call, in that conference 15 call, they kept on asking any agreement with Sears yet. 16 Q Okay. Mr. Shomof, I want to be very precise, 17 though. Was it any agreement with Sears or was it an 18 agreement that Sears would close for six months? What 19 was the condition that the lenders were placing upon the 20 financing? 21 A Any agreement with Sears. 22 Q Any at all? 23 A Yeah. 24 Q You had an agreement with Sears; correct? 25 A No. Any -- no. They have the agreement that	Page 77 1 your financing? 2 A I don't believe that was a condition. 3 Q I'm asking then, sir, what was the condition? 4 A If I have an agreement with Sears on us doing 5 the seismic retrofit in that space. 6 Q Which you had under the amendment; correct? 7 A If it is closed for six months, the whole 8 space or partial of it, I don't remember. 9 Q Okay. This was an important aspect of getting 10 the deal done; correct? This agreement with Sears? 11 A Yes. For us, yes. 12 Q And getting your construction financing was a 13 big deal; correct? 14 A Correct. 15 Q So sitting here today, you cannot remember the 16 specific requirement and condition of financing as it 17 relates to an agreement with Sears? 18 A Like I said, yes, I do remember. There was an 19 agreement with Sears. 20 Q However defined? 21 A If it was partially or the whole of Sears 22 willing to close -- shut down for the whole time or if 23 there is a fee, what would be the fee for the period of 24 six months. And -- and we going little bit further by 25 repeatedly we see articles that Sears shutting down
Page 78 1 I had with Sears. 2 Q Correct? 3 A Any agreement, if they -- if they say no for 4 six months, if I'm going to be changing it from me doing 5 in partial. 6 Q But you had that agreement with Sears under 7 the amendment; correct? 8 A They had that. They had that. 9 Q Okay. 10 A So they were waiting to see if Sears are 11 cooperating to be able to allow us to do it. If not 12 shut down the whole Sears, maybe half of it. Maybe 13 quarter of it. But once we had no cooperation with 14 Sears, so that's why they kept on holding up until they 15 pulled way. 16 Q I understand, Mr. Shomof. 17 What I'm asking is: What was the condition. 18 Was the condition any agreement with Sears or was it a 19 specific agreement with Sears? 20 A I have to revisit it. Maybe it's about 21 looking at Sears, if they're willing to close for six 22 months. 23 Q So you're saying it's possible that the 24 condition to your construction financing was that Sears 25 agreed to close for six months? That was a condition of	Page 80 1 stores after stores, and we get the list of stores that 2 Sears are shutting. We were hoping that maybe this 3 store would be one of them for us to be able to do the 4 seismic retrofit. 5 But it happened to be that that store did not 6 happen, which I understand. In a way, we were happy 7 because place keep -- there's going to be still people 8 running around there. But the issue here is that if we 9 would know from Sears that the answer is Izek, we are 10 not shutting down unless you pay us 2 million or 11 10 million or 1 million -- doesn't make a difference -- 12 or we are not shutting down at all, you have to work 13 with what the lease says, we will basically addressing 14 at that route. But we had no one to talk to. 15 Q Mr. Shomof, if you were concerned about not 16 having anyone to talk to, why didn't you just proceed 17 under the terms of the amended lease? 18 A There was no one to talk to. That's why I 19 spoke to Steve. 20 Q But you said you had an agreement under the 21 amended lease. You had the agreement already worked 22 out. The bank had that agreement. Why not proceed 23 under those terms? 24 A Hoping that Sears will negotiate. 25 Q Maybe not forever, but you can put these

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<p>1 aside. 2 A Definitely not forever. 3 MR. WEAVER: We up to eight? 4 THE REPORTER: Yes. 5 (Exhibit 8 marked.) 6 BY MR. WEAVER: 7 Q Mr. Shomof, I'm handing you a document we've 8 identified as Exhibit 8. It's a e-mail chain that the 9 landlord produced in this dispute Bates stamped SK 6778 10 through 6784. And you can look at the entire chain, but 11 there are specific e-mails I'm going to reference and 12 point you to. So when you're ready, I can point you to 13 where I'm specifically focused. 14 A Yeah. Go ahead. 15 Q Okay. So if you turn all the way to the end, 16 this chain goes in reverse order. Some of the chains go 17 in the other order. But going towards the end -- 18 A You talking about the end? The last page? 19 Q Technically, the second-to-last page. So you 20 see the Bates numbering at the bottom? There are 21 stamped numbers at the bottom of each page. 22 Do you see that? 23 A Okay. Yes. 24 Q I'm on page 6783. 25 A Okay.</p>	<p>1 Do you see that? 2 A Yes. 3 Q Do you recall in June 2018 that there was an 4 issue with smoke damage and air quality within the Sears 5 store resulting from the construction? 6 A Well, like I -- I don't remember it in detail. 7 Q Uh-huh. 8 A But, like I said, Sears equipment, it was 9 scattered all over the building. 10 Q Uh-huh. 11 A That's why we were trying to minimize it by 12 installing the HVAC units. But most likely, when the 13 contractors were working up there through the vents, 14 maybe smoke got into Sears. I don't remember it in 15 detail exactly what happened. 16 Q You don't remember there being a smoke -- 17 smoke damage in the Sears store? 18 A More or less, I do. But in detail, I don't. 19 Q If you go to the -- the first page of this 20 e-mail chain in 6778. So, again, the top -- the very 21 top e-mail, which is August 31st, 2018. So a month and 22 a half since the e-mail we just looked at. And you're 23 copied on this e-mail. 24 First of all, do you recall getting this 25 e-mail, the one at the top that begins "Guys"?</p>
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<p>1 Q Is that where you are? 2 A I am, yes. 3 Q Okay. Do you see an e-mail from June 20th, 4 2018, at 11:59 P.M. toward the top of the page? 5 A Yes. 6 Q This is from Steve that we've been discussing. 7 A Yes. 8 Q And it seems to be -- it has a -- a weird kind 9 of formation of who's receiving the e-mail. But I will 10 say at the top of the e-mail chain, you are for sure 11 copied. So at least you received this chain. I don't 12 know if you specifically received this e-mail on 13 June 20th, but I want to ask you a couple questions 14 about it. 15 A Yes. 16 Q So this is on June 20th where Steve writes 17 "From what I hear, you are gearing up the construction 18 of the Sears site. I understand there have been some 19 issues that we need" -- "that we should discuss, 20 including smoke damage to the air quality of the Sears 21 store. But I also" -- "but I think we also need to have 22 a broader conversation about the project, including 23 structure and scope of the project, timing, the protocol 24 for construction, and agreed-upon improvements for the 25 Sears portion."</p>	<p>1 A Maybe, yeah. 2 Q Do you recall it? 3 A I don't recall, no. 4 Q You were copied. I'm just asking if you 5 recall it. 6 A No. 7 Q Okay. Steve writes "We're having more 8 problems at the Sears store because of the work of your 9 demo contractors. We had flooding in the storage room 10 and have lost electrical. Please stop further work 11 until we meet. This is not sustainable, and we'll need 12 to start enforcing our rights more aggressively unless 13 we iron out a game plan that actually works." 14 Do you recall an issue where Sears raised 15 complaints about the disruption to their business from 16 your construction work? 17 A No. I'll tell you -- I'll tell you -- 18 Q It's a yes-or-no question, sir. Do you 19 recall? 20 A As far as I remember, more or less, yes, I do. 21 Q You do recall that? Okay. 22 A Yes. 23 Q My next question is: What did you do to 24 address these concerns? 25 A That's what I'm saying. Sears' building is</p>

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<p>1 1.6 million square feet with about 20 different 2 entrances. And homelesses repeatedly were breaking into 3 Sears, breaking copper pipes, breaking sprinkler pipes, 4 stealing them. And in many occasion, when they do so, 5 water leaks downstairs.</p> <p>6 And Steve just understanding that there is a 7 water issue, so he send it to us. Right away, we send 8 people to check. And we find that homelesses again 9 breaking into the place. At the end of the day, 10 homelesses or not, we immediately trying to address any 11 issues. What did we do in that particular time? Send 12 people to address the problem. And the problem was 13 addressed immediately.</p> <p>14 Q So your testimony is that the interruption and 15 damage to the Sears store was not caused by the 16 construction demolition work that your contractors were 17 performing?</p> <p>18 A In this particular one, I'm not going to be 19 sitting over here and swearing that it did not. But 20 90 percent of the time that what happened, it's 21 homelessness issue. And it's still happening as we 22 speak with homelesses breaking into the space. We have 23 two live security guard throughout the building to try 24 to avoid them. They still getting in.</p> <p>25 Q I just want to make sure I'm clear. Is your</p>	<p>1 Q For -- for the fire system within the building 2 itself. Obviously, you understand that fire can spread. 3 A The fire sprinklers -- fire sprinklers, no, 4 because they've been gut out by the homelesses. They 5 sell it as metal and copper. But within Sears' space, 6 100 percent yes.</p> <p>7 Q Do you agree that if the building caught fire, 8 that could be disruptive to the Sears business even if 9 Sears has sprinklers in their own space? Correct?</p> <p>10 A If the building got fire up there in the upper 11 floor?</p> <p>12 Q Anywhere.</p> <p>13 A Could very much be, yes.</p> <p>14 MR. WEAVER: Okay. Thank you. You can set 15 that one aside.</p> <p>16 (Exhibit 9 marked.)</p> <p>17 BY MR. WEAVER:</p> <p>18 Q Hand you another e-mail chain that we've 19 marked as Exhibit 9 bearing Bates Number SK 68008 20 through 6817.</p> <p>21 Now, this one goes in chronological order. So 22 the oldest e-mail is in the front, and the newest 23 e-mail, I believe, is in the back.</p> <p>24 Again, you can look at the entire chain, but 25 there are specific e-mails I want to point you to. Let</p>
<p>Page 86</p> <p>1 testimony that there were no disruptions to Sears caused 2 by the construction work that you were doing at the 3 project?</p> <p>4 A No. I -- just before that question, I 5 admitted that due to the construction, smoke got into 6 Sears because of the HVAC.</p> <p>7 Q Is that the only issue that happened during 8 the course of construction?</p> <p>9 A No. If you remind me other one. If I 10 remember it, I'll tell you. If it's -- that particular 11 one, if it was due to homeless or construction, I'm not 12 going to sit over here and say, no, it's 100 percent 13 with the homeless. But I know that we have a lot of 14 issues by the homelesses.</p> <p>15 Q During the construction, did your contractors 16 disable the fire sprinkler alarm system within the 17 building?</p> <p>18 A No. That was homelesses.</p> <p>19 Q The homeless?</p> <p>20 A (Witness nods head.)</p> <p>21 Not disable it in Sears' space. But broke 22 pipe upstairs.</p> <p>23 Q I understand. And -- and did you immediately 24 fix that -- address that problem as well?</p> <p>25 A For Sears' space or the upper floor?</p>	<p>Page 88</p> <p>1 me know when you're ready.</p> <p>2 A I'm ready.</p> <p>3 Q So a few pages in, at page 6812 --</p> <p>4 A Okay.</p> <p>5 Q -- September 19, 2018, at 5:45 P.M.</p> <p>6 A Okay.</p> <p>7 Q Do you see this e-mail?</p> <p>8 A Yes.</p> <p>9 Q It's an e-mail from Steve to you; correct?</p> <p>10 A Uh-huh.</p> <p>11 Q (Reading:) "Guys, attached is a letter that Sears CEO 12 Eddie Lampert received from the city attorney's office 13 notifying him he's being criminally charged with 14 violations of fire code arising on a citations issue for 15 deficient fire inspection systems for the entire 16 development. Citations also attached."</p> <p>17 "This is a real problem and promises to be a 18 big distraction from our meeting on Friday. I need to 19 understand what the plan is to fix this before we meet 20 on Friday."</p> <p>21 Now, I don't have the attachments because I 22 have an e-mail chain. But do you recall receiving this 23 e-mail?</p> <p>24 A Yes.</p>

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<p>1 Q Okay. And was this a distraction during your 2 discussions with Sears that you were having the 3 following Monday -- or following Friday?</p> <p>4 A It's a very long answer.</p> <p>5 Q Okay. Well, you've given lots of those today, 6 so we --</p> <p>7 A Would you like to hear another one?</p> <p>8 Q I would.</p> <p>9 A I'm glad. And I'm very much glad that you 10 mentioned it. Steve knew better than that. Steve knew 11 that this is 100 percent the fault of Sears. And Steve 12 himself was trying to paint it in a way that this is our 13 fault.</p> <p>14 Now, along the way, we were falling for it 15 because we didn't realize what's going on because we 16 were named on the complaint, too, from the city 17 attorney. Took me some time to get ahold of the city 18 attorney. Finally, the city attorney said that the 19 fault is not yours. You'll find a lot of e-mail along 20 the way that we are working on fixing the problem and 21 trying to find out what is the problem.</p> <p>22 Q Uh-huh.</p> <p>23 A But Sears themselves negligently -- negligently 24 did not fix up the -- they disconnected the fire alarm. 25 They disconnected -- they stop paying for the fee for</p>	<p>1 Sears made me try to clear them out of it. When I found 2 out that it's not our fault, I asked Sears to clear me 3 out of it.</p> <p>4 He was willing to plead guilty in other 5 location but not this one, but at the end, he agreed. 6 And then he tried to negotiate with us. Okay. You pay 7 for the fees. And I said I just don't mind. Clear us 8 from it. And then at the end, he says I'll pay for the 9 fees.</p> <p>10 Q Again, Mr. Shomof, you had requested that 11 Sears enter the plea in this matter as an accommodation 12 related to --</p> <p>13 A I requested?</p> <p>14 Q Let me finish the question.</p> <p>15 You asked Sears to plead to this violation 16 because it would have obstructed your ability to receive 17 construction financing; correct?</p> <p>18 A It's funny.</p> <p>19 Q It's a yes-or-no question. If the answer's 20 no, then tell me no.</p> <p>21 A If Sears are not guilty, why would he plea?</p> <p>22 Q I'm asking whether you --</p> <p>23 A When I found out --</p> <p>24 Q Mr. Shomof, unfortunately, you don't get to 25 ask the questions today.</p>
Page 90	Page 92
<p>1 the fire -- for the monitoring. Sears themselves had a 2 lot of notices that they should have exit signs which 3 were out, which they've not done that. Sears themselves 4 went and put chains on exiting doors which they have 5 notices to remove, which they have not done that. Sears 6 themselves not only had that complaint on that location, 7 Sears themselves had location -- had the same notification 8 on five different locations.</p> <p>9 Finally, after I and my attorney, Mark Cohen, 10 went to the city attorney, and the city attorney said, 11 Izek, it's not your fault. It's Sears' fault 12 100 percent. And that's when -- that's when Steve 13 himself pleaded guilty.</p> <p>14 Q And for the record, I don't think Steve 15 himself pleaded guilty to anything on this case. But --</p> <p>16 A Well, Steve on behalf of Sears, he pleaded 17 guilty.</p> <p>18 Q And was that plea an accommodation to you as a 19 landlord because of your construction financing?</p> <p>20 A I -- like I said before, I was under the 21 understanding in the very beginning because Sears 22 painted it that way that it is because I got the 23 notification, too, and as -- in good faith, I forwarded 24 to my lender. And I said I'm working on clarifying it. 25 And I asked Sears clear me out of it. In the beginning,</p>	<p>1 A When I found out it's Sears' fault, I said 2 please clarify that because I may lose my financing due 3 to this nonsense stuff.</p> <p>4 Q I understand you may want to ask questions 5 today, but the way this works is I ask the questions and 6 you have to answer the questions.</p> <p>7 A That is my answer.</p> <p>8 Q And my question to you is: Did you ask Sears 9 to take the plea as an accommodation because of your 10 construction financing? If the answer's no, then tell 11 me no. But it's a yes-or-no question.</p> <p>12 A It's a no because --</p> <p>13 Q Okay.</p> <p>14 A -- I did not say due to my accommodation. I 15 said plead guilty because you guys are guilty. I did 16 not ask. I insisted that he plead guilty because they 17 were guilty. And we have tons of pictures of showing 18 negligent of Sears covering up exit signs and tying 19 up -- chain up exiting doors. And at the end of the 20 day, on the fire alarm -- on the fire alarm, we end up 21 paying for monitoring company -- for monitoring company 22 because they have not done that.</p> <p>23 MR. WEAVER: We're marking as 24 Exhibit 9 [sic] --</p> <p>25 THE REPORTER: Ten.</p>

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<p>1 MR. WEAVER: Thank you. 2 (Exhibit 10 marked.) 3 BY MR. WEAVER: 4 Q Handing Mr. Shomof another e-mail chain again 5 bearing Bates stamp SK 6818 through 6835. Again, it's 6 another e-mail chain. You can look at as much as you'd 7 like. There are specific areas I will point you to. 8 Let me know when you're ready. 9 A I'm ready. 10 Q Bearing on page -- I think it's the second 11 page, 6819. September 27, 2018, at 10:59 A.M. 12 Do you see that? 13 A Yes. 14 Q Okay. This is an e-mail from you to Steve and 15 others. And you can read the entire e-mail. 16 First of all, do you remember sending this 17 e-mail? 18 A If it's from me, I don't remember in detail, 19 yes, but most likely. 20 Q Okay. I'm just asking if you recall sending 21 it. 22 A No, I don't recall it. 23 Q Okay. The fourth line down, the sentence 24 begins with "What." And you write "What the city 25 attorney is doing doesn't help. And I'm working on</p>	<p>1 A Uh-huh. Yes. 2 Q This is from your attorney, Mark -- 3 A Yes. 4 Q -- to Steve and to yourself? 5 A Yes. 6 Q This is November 20th. So this is two months 7 from the e-mails we were just looking at; correct? 8 A Yes. 9 Q Okay. It says "Unfortunately, Izek entity 10 will not be able to take the plea, and the original 11 offer for your client to take the plea on the third 12 Boyle properties are the only option. The lender will 13 not finance a project if the landlord pleads no 14 contest." 15 A Uh-huh. 16 Q (Reading:) "Izek will gladly pay for the carpet and the 17 paint for the fire inspectors." 18 A Yes. 19 Q So was this your attorney asking Sears to take 20 the plea on the Boyle property? 21 A That's when we start finding out that it's not 22 our fault at all. So Steve take the plea. 23 Q All right. Does that -- is that what this 24 e-mail says? It's not our fault. Steve, take the plea.</p>
<p>1 getting it cleared. Let's work together on getting this 2 project started." 3 You see that? 4 A Yes. 5 Q Okay. Did -- here, you're not telling Steve 6 that it's -- the city attorney was -- what you just 7 testified and were telling me you didn't relate to Steve 8 in this e-mail; is that correct? 9 A That's when I told you and from my previous 10 answer, at the beginning, Steve was making it sound like 11 it's our fault. 12 Q Okay. 13 A We were working very hard to try to clarify 14 the situation up until I found out from the city 15 attorney himself that it's not our fault. It's 16 definitely the Sears' fault. 17 Q Had you spoken to the city attorney by the 18 time you sent this e-mail on September 27, 2018? 19 A I don't -- I don't think I did. Maybe after 20 that I did. 21 Q Maybe? But you don't know? 22 A No. 23 Q Okay. A few pages into the chain, at 6823, an 24 e-mail November 20, 2018, at 4:55. 25 You see that?</p>	<p>1 Is that -- is that what your attorney wrote? 2 A If he did not write it down on this one here, 3 at a later time, that was the conversation. Steve, it's 4 not our fault. Take the plea. 5 Q Okay. Here I see your attorney -- all -- all 6 I can deal with are facts, and documents are a set of 7 facts. So those are things I can ask questions about. 8 So I've got an e-mail here from your attorney that says 9 that you can't take the plea because you won't get the 10 financing. 11 A Okay. 12 Q It's asking Sears to take the plea. I don't 13 see anything here about it being Sears' fault or 14 anything along those lines. 15 So my question is: Does this e-mail reflect 16 the request that you as a landlord made to Sears to take 17 the plea? It's a "yes" or "no." If the answer's no, 18 tell me no. 19 A No. Here, we were still under the impression 20 that it was -- that it was our fault. The bottom line 21 here, Sears pleaded guilty. Sears would not plead 22 guilty to do me no favor. Sears pleaded guilty because 23 they knew that they were in fault. 24 Q Well, Mr. Shomof -- 25 A If you're talking about facts, that is the</p>

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<p>1 fact of the matter.</p> <p>2 Q All I have is, again, the documents. That's</p> <p>3 what I'm asking you about. Okay?</p> <p>4 A I know. The document -- the document does</p> <p>5 show it.</p> <p>6 Q Let me finish.</p> <p>7 A The document does show that Steve pleaded</p> <p>8 guilty.</p> <p>9 Q I -- I understand that. And I have a document</p> <p>10 here that -- where your attorney asks Sears to do so;</p> <p>11 correct?</p> <p>12 A My attorney asked him to do what?</p> <p>13 Q To plead guilty, to take the plea.</p> <p>14 A If they were not guilty, would they plead</p> <p>15 guilty?</p> <p>16 Q Well --</p> <p>17 A If I asked you to plead guilty on a murder</p> <p>18 that just occurred, would you plead guilty?</p> <p>19 Q Mr. Shomof, again, you don't get to ask the</p> <p>20 questions.</p> <p>21 A Let's be -- let's be realistic here.</p> <p>22 Q Well, Mr. Shomof, was it important to get this</p> <p>23 project financed?</p> <p>24 A Very important.</p> <p>25 Q Okay.</p>	<p>1 A Yes.</p> <p>2 Q Okay. And this is at the time you said Steve</p> <p>3 had no one to speak to at Sears; correct?</p> <p>4 A Yes.</p> <p>5 Q This is the time when you had no one to speak</p> <p>6 to at Sears; correct?</p> <p>7 A Yes.</p> <p>8 Q This was resolved. Was it not?</p> <p>9 A Because --</p> <p>10 Q "Yes" or "no," Mr. Shomof?</p> <p>11 A It -- Mr. Shomof. Yes. Yes, it was</p> <p>12 resolve --</p> <p>13 Q Thank you.</p> <p>14 A -- due to Mr. Lampert himself was named on</p> <p>15 that complaint. That's why it was resolve.</p> <p>16 Q Mr. Shomof, we've talked today about a meeting</p> <p>17 that took place at the conference room at Sears in</p> <p>18 September of 2018 where a discussion was held regarding</p> <p>19 scheduling a plan for the seismic retrofit; correct?</p> <p>20 A Yes.</p> <p>21 Q And you also testified there was a meeting a</p> <p>22 few weeks or so before that meeting at Steve's office;</p> <p>23 correct?</p> <p>24 A Correct.</p> <p>25 Q Okay. And I just want to make sure that the</p>

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<p>1 A We did everything possible in our power to get</p> <p>2 this project going.</p> <p>3 Q Do you think it was important to Sears to have</p> <p>4 this project going?</p> <p>5 A I don't think it did. I don't think they</p> <p>6 cared.</p> <p>7 Q You don't think it -- you don't think they</p> <p>8 cared?</p> <p>9 A No, I don't think they cared. That's why we</p> <p>10 are sitting over here.</p> <p>11 Q Okay. So you think that Sears is happy to</p> <p>12 have the -- no development at the project. Is that --</p> <p>13 was that your testimony today?</p> <p>14 A The fact of the matter is it shows that they</p> <p>15 just didn't care. I pleaded along the way. If you're</p> <p>16 pulling e-mails, what -- and I'll pull you tons of other</p> <p>17 e-mails that you're not concentrating on --</p> <p>18 Q I only have so much time.</p> <p>19 A -- that show -- that shows how much I pleaded</p> <p>20 with them to cooperate.</p> <p>21 Q Mr. Shomof, this is -- this e-mail chain is</p> <p>22 taking place November of 2018; correct?</p> <p>23 A That's what it looks like, yes.</p> <p>24 Q Yeah, so this is after Sears filed for</p> <p>25 bankruptcy; correct?</p>	<p>1 record's clear. The meeting at Steve's office, can you</p> <p>2 name everyone that was in attendance at that meeting?</p> <p>3 A I don't -- no. I remember Steve was there and</p> <p>4 Alan Shaw was there. Out of my people, I don't remember</p> <p>5 who was there.</p> <p>6 Q Was there anyone else there on behalf of</p> <p>7 Sears?</p> <p>8 A Maybe.</p> <p>9 Q Was there anyone else there representing the</p> <p>10 landlord?</p> <p>11 A Could very much be. Yes. I don't remember</p> <p>12 exactly. Probably Jonathan was there too.</p> <p>13 Q Is it your normal practice to go to a meeting</p> <p>14 like this by yourself?</p> <p>15 A Yes.</p> <p>16 Q Okay. So it's possible you were the only one</p> <p>17 there?</p> <p>18 A Could be.</p> <p>19 Q Okay. Sitting here today, you can't recall?</p> <p>20 A No, I cannot.</p> <p>21 Q And then the second meeting that took place, I</p> <p>22 believe, was September 21st at Sears' conference room.</p> <p>23 Can you tell me everyone who was at that meeting?</p> <p>24 A Steve again. The guy that I don't remember</p> <p>25 his name. There was another guy that, again, I don't</p>

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<p>1 remember his name too. Jonathan Shomof was there, and I 2 believe Jimmy, too, Jimmy Shomof.</p> <p>3 Q Okay. Was the sole purpose of this meeting to 4 discuss the seismic retrofit construction schedule?</p> <p>5 A That's as far as my recollection, yes.</p> <p>6 Q Okay. Do you recall anything else being 7 discussed at that meeting?</p> <p>8 A I don't remember if the fire issue or the fire 9 department issue was discussed too. I don't remember 10 that.</p> <p>11 Q Okay. Anything else that was discussed?</p> <p>12 A No, I don't remember.</p> <p>13 Q Okay. And during this meeting in the Sears 14 office -- Sears' office conference room, at that meeting 15 you had requested that Sears close for more than six 16 months; is that correct?</p> <p>17 A This meeting and the meeting before that with 18 Alan Shaw too.</p> <p>19 Q And can you tell me everything you recall that 20 representatives of Sears said in response to that 21 proposal?</p> <p>22 A Everything, I don't remember. I remember that 23 other person saying it will cost for Sears to shut down. 24 That's what I remember.</p> <p>25 Q Do you remember anything else about the</p>	<p>1 at the time it was sent?</p> <p>2 A When?</p> <p>3 Q Do you remember seeing this when it was sent?</p> <p>4 Do you recall seeing this?</p> <p>5 A Probably, yes.</p> <p>6 Q Did you review it before it was sent?</p> <p>7 A Most likely I did.</p> <p>8 Q Okay. Do you recall if you ever had any 9 comments on the draft?</p> <p>10 A If -- I don't remember exactly, but maybe.</p> <p>11 Q Is this the plan that you discussed that you 12 needed -- is this the plan that you sent to Sears 13 following the September 21st meeting?</p> <p>14 A Yes. I mean, that -- that what it says here, 15 we talked to them in that meeting and talked to them in 16 the previous meeting.</p> <p>17 Q Okay.</p> <p>18 A And then we put it in writing.</p> <p>19 Q Right.</p> <p>20 A This -- what was put in writing.</p> <p>21 Q And you state -- I'm sorry. You don't state.</p> <p>22 Joseph [sic] states in the first paragraph 23 that hopefully, the permits will be pulled 24 November 2018.</p> <p>25 You see that?</p>
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<p>1 conversation?</p> <p>2 A No.</p> <p>3 Q Okay. How did you leave things at the end of 4 that meeting?</p> <p>5 A We have to do a plan, and we'll send it to 6 you.</p> <p>7 Q Who's the "we"? Sorry.</p> <p>8 A Us.</p> <p>9 Q Okay.</p> <p>10 A The landlord. We have to do a plan, and we'll 11 send it to you to detail, one we are looking for.</p> <p>12 Q Okay. Did you ever prepare that plan?</p> <p>13 A I believe Jonathan did.</p> <p>14 Q Okay. Did you ever send it to Sears?</p> <p>15 A I believe he did.</p> <p>16 MR. WEAVER: Mark this next. (Exhibit 11 marked.)</p> <p>18 MR. WEAVER: Thank you.</p> <p>19 Q Mr. Shomof, I'm handing you a document we've 20 marked as Exhibit 11, which is a letter dated 21 September 25th, 2018, on East River Group, LLC, 22 letterhead from Jonathan Shomof.</p> <p>23 Do you see this?</p> <p>24 A Yes.</p> <p>25 Q This -- do you remember seeing this document</p>	<p>1 A You mean Jonathan?</p> <p>2 Q Jonathan, sorry.</p> <p>3 A Yes.</p> <p>4 Q Was it your expectation that the permits be 5 pulled in November 2018?</p> <p>6 A Yes.</p> <p>7 Q Why'd you expect them to be able to pull the 8 permits?</p> <p>9 A Why --</p> <p>10 Q Yeah.</p> <p>11 A -- did we expect it? Because that's what our 12 architect was saying. Our engineer was saying by that 13 date, we will.</p> <p>14 Q And you see in the paragraph underneath the 15 numbered paragraphs, it says "Hopefully, Sears will 16 agree to close from February 1st, 2019, to August 15th, 17 2019."</p> <p>18 You see that?</p> <p>19 A Yes, I do.</p> <p>20 Q Okay. Then he says that construction for the 21 Sears store will begin immediately during that time 22 frame.</p> <p>23 A Yes.</p> <p>24 Q Okay. Mr. Shomof, had the permits for the 25 work been pulled by February 1st, 2019?</p>

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<p>1 A It could have been pulled. 2 Q What do you mean "could have been pulled"? 3 A Well, we pulled the permit, I think, 4 February 5th or 10th. 5 Q Okay. 6 A The reason we decided to do that, just to 7 preserve our entitlement. We didn't want to pull that 8 if it wouldn't be the issue with the entitlement because 9 we were waiting for financing to pay for the permit fee. 10 But the end of the day, we pull it out of pocket just to 11 preserve our entitlement. But it could have been pulled 12 a month prior or a week prior.</p> <p>13 Q To be clear, on the date of this letter was 14 written on December 25th, 2018, you had not finalized or 15 closed on your construction financing; correct?</p> <p>16 A Finalized our construction financing? Like I 17 said before and I'm saying it again, our construction 18 financing had a few conditions that the majority of the 19 conditions were very, very, very minor. Could have been 20 done with no -- no issue. The one major issue was the 21 Sears issue, the Sears agreement issue.</p> <p>22 MR. WEAVER: Let's use tab 13. 23 Let's make this Exhibit Number 12. 24 (Exhibit 12 marked.) 25 ////</p>	<p>1 A So he understood it that way. That was not 2 our intention direction. We told him that's what we 3 talked about. That's how we spelled it out in the 4 letter.</p> <p>5 Q And so your understanding was that the letter 6 itself had spelled out the timeline necessary -- 7 A Yes. 8 Q -- to complete the project? 9 And that it resolved all the issues that you 10 discussed during the meeting prior to sending the 11 letter?</p> <p>12 A To preserve all the issue. There's always 13 other issue comes along. But I don't know. Most likely 14 it was. It's a very vague question, you know? From 15 minute to minute, issues can occur. What issues are you 16 talking about?</p> <p>17 Q Well, I don't know. You were in the meeting. 18 I wasn't, sir. That's why I'm asking.</p> <p>19 A Oh, you talking about the issues of the 20 meeting?</p> <p>21 Q Correct.</p> <p>22 A Oh, I'm sorry.</p> <p>23 Q That Steve seems to be referring to.</p> <p>24 A Okay. Well, the issues -- we spelled out the 25 summary of the conversation. We send him that e-mail.</p>
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<p>1 BY MR. WEAVER:</p> <p>2 Q Mr. Shomof, we've handed you exhibit marked 3 Number 12, another e-mail chain bearing Bates Number 4 SK 6801 to 6802.</p> <p>5 Do you see at the bottom of this first page, 6 there appears to be a e-mail from Steve to Jonathan, 7 you, and others?</p> <p>8 A Yes.</p> <p>9 Q Okay. And this is dated February -- I'm 10 sorry -- Friday, September 28th.</p> <p>11 You see that?</p> <p>12 A Yes.</p> <p>13 Q Okay. So he's confirmed receipt of your 14 letter; is that right?</p> <p>15 A Yes.</p> <p>16 Q And he states "To be clear, this letter does 17 not appear to be offered in the spirit in which we 18 discussed it last week."</p> <p>19 What did you understand him to mean by "not in 20 the spirit"?</p> <p>21 A I don't know.</p> <p>22 Q He states that it comes across more as a 23 direction from you as opposed to offering a proposed 24 timeline outlining some of the issues that remain to be 25 negotiated.</p>	<p>1 He understood it differently. So the answer is no, I 2 don't understand what exactly he mean by the spirit of 3 the issue.</p> <p>4 Q In the third paragraph, he states "The history 5 of the project is riddled with errors that have put our 6 employees and patrons at risk and breached negotiated 7 protocols, not to mention broken promises about timing. 8 Just two months ago, you notified us that you would 9 likely not pursue this project."</p> <p>10 Did you ever communicate in sum or substance 11 to Steve or anyone representing Sears that you were not 12 likely to pursue the redevelopment project?</p> <p>13 A That's not the way he spelled it out, not at 14 all. When I was sitting down at Steve's office with 15 Alan Shaw, I said it's getting costly because Alan said 16 it may cost you for us to shut down. I said the project 17 is getting costly. Don't bring it to a situation, come 18 with a number that I'm not going to be able to do it.</p> <p>19 Q Okay. Well, let's go back because I thought 20 I'd asked you about all the details of that conversation 21 in that meeting. So let's go back to that meeting 22 because I want to make sure I have the complete picture.</p> <p>23 So during that meeting, did you -- what did 24 you say about the project becoming costly?</p> <p>25 A It's for them, you know. When we are talking</p>

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<p>1 to them about us taking the place for six months --</p> <p>2 Q Uh-huh.</p> <p>3 A -- they said it may be costly. So I said our</p> <p>4 project is getting to be too costly.</p> <p>5 Q Uh-huh.</p> <p>6 A So don't come back with a number that may not</p> <p>7 allowing us to do the project. That was a -- that was</p> <p>8 something that we were negotiating in a way, talking.</p> <p>9 It's not -- he understood it, oh, you may not do the</p> <p>10 project. I called him verbally right after that. And I</p> <p>11 said, Steve, I never said at no time that I may not do</p> <p>12 the project. We're very passionate with the project.</p> <p>13 We have done -- we spent millions of dollars into this</p> <p>14 project to pull away. Our intention is not pulling</p> <p>15 away. And he knows that.</p> <p>16 Q But you didn't send him an e-mail to that</p> <p>17 effect or a letter; correct?</p> <p>18 A Maybe I did. I don't remember. I have to</p> <p>19 look into it. Did you receive anything like that?</p> <p>20 Q Do you recall seeing a letter to that effect</p> <p>21 to Steve or an e-mail?</p> <p>22 A No.</p> <p>23 Q You mentioned and testified earlier that if</p> <p>24 Sears did not close for six months and this project had</p> <p>25 to be done in stages, that, too, would also increase the</p>	<p>1 saying today that you can't say whether, one way or the</p> <p>2 other, it would have been more expensive for you to</p> <p>3 complete the project if Sears didn't shut down for six</p> <p>4 months?</p> <p>5 A No, I'm not in a position to say it definitely</p> <p>6 would cost us more money.</p> <p>7 Q So then -- so if you didn't know it would</p> <p>8 definitely cost you more money, why not just move ahead</p> <p>9 with the original agreement?</p> <p>10 A You know, you're doing negotiation with Sears.</p> <p>11 You're working on getting them to shut down, if</p> <p>12 possible, for three months -- for six months. All they</p> <p>13 had to say, sorry, Mr. Shomof, we are not closing for</p> <p>14 six months. We are not able unless we are getting "X"</p> <p>15 amount of dollar. I would do -- I would go different</p> <p>16 routes.</p> <p>17 Q So what you're saying is this extremely</p> <p>18 important, very expensive project that you've committed</p> <p>19 so much to, you simply sat there waiting for five months</p> <p>20 for Sears to come back and say we're not shutting down</p> <p>21 for six months without doing anything else?</p> <p>22 MR. KUPETZ: Objection. Mischaracterizes the</p> <p>23 testimony.</p> <p>24 BY MR. WEAVER:</p> <p>25 Q You can answer the question.</p>
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<p>1 expense to you.</p> <p>2 A Could very much be, yes.</p> <p>3 Q Could or would?</p> <p>4 A Could. Most likely would.</p> <p>5 Q Mr. Shomof, if Sears did not close for six</p> <p>6 months, would the project be more expensive for you to</p> <p>7 complete?</p> <p>8 A Maybe lengthier. It would be lengthier, take</p> <p>9 longer time. If we would have finished it in three</p> <p>10 years, no. If it would drag behind three years, yes.</p> <p>11 Q So my question is you've said that it would</p> <p>12 take longer to do the project. By taking longer, would</p> <p>13 that have been more expensive to the landlord?</p> <p>14 A If we pass three years because our</p> <p>15 construction loan is three years. If we would pass the</p> <p>16 three years, it would be.</p> <p>17 Q Did you need Sears to close for six months to</p> <p>18 be able to pass in three years?</p> <p>19 A Guaranteed that we are not going to pass in</p> <p>20 three years if Sears would shut down for six months. If</p> <p>21 they would not have shut in six months, it probably</p> <p>22 would have -- probably would have finish it, but maybe</p> <p>23 it would exceed the three years, and that's where it'd</p> <p>24 be more costly.</p> <p>25 Q So just to be clear, Mr. Shomof, are you</p>	<p>1 A Either/or.</p> <p>2 Q So you just sat there, waiting?</p> <p>3 A We are just sitting there to just hear from</p> <p>4 them. We -- we are just waiting for them. Are we --</p> <p>5 are we going to be able to get the space? If they say</p> <p>6 no, we'll go different route. In the meanwhile, while</p> <p>7 we were waiting, we lost our construction loan.</p> <p>8 Q Getting back to what I was attempting to</p> <p>9 ask -- and I -- hopefully, it is clear -- my question's</p> <p>10 clear -- you're unable to say today whether or not Sears</p> <p>11 did not close for six months, the project would have</p> <p>12 cost you more money?</p> <p>13 A My answer is we were hoping and it would be</p> <p>14 preferably if Sears would close for six months for us to</p> <p>15 be able to finish the job 100 percent within three</p> <p>16 years.</p> <p>17 Q I understand your preference. But I'm asking</p> <p>18 whether or not at the time of these negotiations, you</p> <p>19 had a view of whether or not it would be more expensive</p> <p>20 for you if Sears did not close for six months.</p> <p>21 A It would be more expensive if we -- if we will</p> <p>22 go over the three years.</p> <p>23 Q Okay. And by not -- by Sears not closing for</p> <p>24 six months, did it make it a real concern that you would</p> <p>25 go over three years?</p>

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<p>1 A It would be -- yeah, it was a concern. 2 Q And you had -- and you had said during this 3 earlier meeting in Steve's office that the project was 4 becoming more expensive? 5 A If I have to pay you millions of dollars to 6 shut down, it will be very expensive. And yes, the job 7 was getting more expensive. 8 Q Did you have a number in your head of at what 9 point the project would become so expensive it would not 10 make sense to complete? 11 A Sense to complete it makes. But there is no 12 reason why not to build it. 13 Q Okay. 14 A If you go behind the three years of 15 completing, the lender can call off the loan. There is 16 other issue that may be affiliated with that. 17 Q Uh-huh. 18 A We didn't want to -- we wanted to be sure that 19 we are going to be able to finish it up within three 20 years, and we were 100 percent sure if Sears would shut 21 down for six months, 100 percent sure we can complete 22 that job in three years. Our general contractor said, 23 yes, we can finish it up in three years, but I'm not 24 guaranteeing it 100 percent that I will finish it up in 25 three years.</p>	<p>1 anything to make sure that the loan -- that the 2 construction project would be completed in three years; 3 correct? 4 MR. KUPETZ: Objection to the extent you're 5 asking for a legal conclusion. 6 BY MR. WEAVER: 7 Q I'm asking for your understanding as the 8 landlord who signed the lease. 9 A No obligation of Sears. I don't see it that 10 way. 11 Q Well, how do you see it? 12 A Maybe legally you may be correct, which I 13 don't know. 14 Q I'm not asking as a lawyer. 15 A I may ask my attorney to see legally if it's 16 "yes" or "no." But logically, I don't see it that way. 17 Q Why not? 18 A Why don't I see it that way? 19 Q Yes. 20 A Because I see that Sears should cooperate 21 because they have huge benefits for us completing this 22 project. Huge benefits. 23 Q Can you point to anywhere in the 2015 24 amendment or the 2011 lease the basis of that belief? 25 A Again, talking about legally, I am not sure.</p>
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<p>1 Q And the risk of you not finishing it up in 2 three years is a risk that you, the landlord, took on 3 under the 2015 amendment; correct? 4 A Repeat that. 5 Q The risk that it would take more than three 6 years to complete and increase your cost was a risk that 7 you bore under the 2015 amendment; correct? 8 MR. KUPETZ: Objection to the extent you're 9 asking for a legal conclusion. 10 MR. WEAVER: I'm asking for his understanding 11 as a landlord who signed the agreement. 12 THE WITNESS: I do not understand your -- if 13 you don't mind, repeat it again. 14 BY MR. WEAVER: 15 Q I do not. I'm glad. If you don't understand, 16 you should ask me to clarify. 17 A Yes. 18 Q Under the 2015 amendment, the seismic retrofit 19 and all of the construction was to be done solely at the 20 landlord's cost and expense; correct? 21 A Yes. 22 Q Sears was not to share in that cost and 23 expense in any way; correct? 24 A Correct. 25 Q So there was no obligation for Sears to do</p>	<p>1 I let my attorney answer that question. Legally. If it 2 is legally. I'm not 100 percent sure. You may be 3 correct. But I'm saying logically, I believe personally 4 that Sears should have cooperated, should have. It 5 would benefit them much more than if they were not -- 6 than what it is now. 7 Q And your basis for saying they did not 8 cooperate was the fact they never responded to your 9 offer for them to shut down for six months without 10 cooperation -- without compensation? 11 A No. They could -- they should have -- they 12 should have respond. Not exactly responding saying, 13 yes, Izeck, we agree with you. We will shut down for six 14 months. They should cooperate by answering back. No, 15 we are not agreeing. We are not shutting down for six 16 months. 17 Q And that is the precise issue that you state 18 is a reason why they did not cooperate, thus costing you 19 over \$5 million in cure costs? 20 A Not only that. 21 Q Well, that's -- I asked you earlier today what 22 are the bases. 23 A They should have -- the bases are that Sears 24 drugged us. When they went silence due to the 25 bankruptcy, it cost us damages. That is why we're</p>

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<p>1 sitting over here, and that is to be determined in the 2 court of law.</p> <p>3 Q Correct.</p> <p>4 A So legally, I'm not here to answer any 5 question.</p> <p>6 Q Of course.</p> <p>7 A Again, that's why I'm presenting -- I'm hiring 8 an attorney to take it to a court of law and let the 9 jury decide if I'm at fault or Sears at fault.</p> <p>10 Q And as a landlord who signed the 2015 11 amendment, are you aware of anything that you as the 12 landlord believe that Sears did that was contrary to 13 their obligations under the lease? Is there something 14 you think they did wrong under the lease and amendment?</p> <p>15 A I said -- I answered that question three 16 times. And I will answer it one more time.</p> <p>17 Q It's a "yes" or "no."</p> <p>18 A Legally --</p> <p>19 Q If you give me "yes" or "no."</p> <p>20 A That's not true. But logically, they have 21 done wrong, yes.</p> <p>22 Q Okay. Logically. Point to me in either the 23 lease or the 2015 amendment what they logically did 24 wrong.</p> <p>25 A If you ask me to point to the lease, I let my</p>	<p>1 LOS ANGELES, CALIFORNIA; MONDAY, JUNE 24, 2019 2 2:17 P.M. 3 4 (Exhibit 13 marked.) 5 6 EXAMINATION (Continued) 7 BY MR. WEAVER: 8 Q Mr. Shomof, we've handed you a document that's 9 been marked Exhibit 13, which is an April [sic] 12, 10 2019, letter from Mark Cohen, who, I believe, is your 11 counsel to -- to Steve. 12 MR. KUPETZ: Did you mean to say "February"? 13 MR. WEAVER: I did. 14 MR. KUPETZ: I thought I heard you say 15 "April," but I'm not sure. 16 MR. WEAVER: I did. It's February 12th, 2019. 17 MR. KUPETZ: Okay. 18 BY MR. WEAVER: 19 Q Okay. And it says cc to client. I assume is 20 you. Do you recall receiving or seeing this letter? 21 (Reporter seeks clarification.) 22 THE WITNESS: Yes. I said I do. 23 BY MR. WEAVER: 24 Q Do you -- the -- the last paragraph -- I guess 25 second-to-last paragraph technically -- it says</p>
<p>1 attorney point to the lease if there is anything there. 2 Q You do understand, though, regardless, not as 3 a lawyer, but as a landlord, that your rights and 4 obligations of the parties is governed by the lease and 5 the amendment?</p> <p>6 A I do understand that.</p> <p>7 MR. KUPETZ: Objection to the extent you're 8 asking for a legal conclusion.</p> <p>9 MR. WEAVER: I'm asking for his understanding 10 as the landlord who signed the agreement.</p> <p>11 Q Do you understand that that was the agreement 12 that you signed to govern your relationship with Sears?</p> <p>13 A If my attorney will agree to it.</p> <p>14 Q I'm asking your understanding.</p> <p>15 A Most likely, yes.</p> <p>16 Q Why do you sign leases as a landlord?</p> <p>17 A To govern agreements.</p> <p>18 MR. WEAVER: Let's take a break. 19 (Lunch recess.)</p> <p>20 //// 21 //// 22 //// 23 //// 24 //// 25 ////</p>	<p>1 East River's entitlements will expire unless 2 construction begins prior to March 16, 2019. 3 Do you see that?</p> <p>4 A Yes.</p> <p>5 Q At this point, February 12th, 2019, was the 6 landlord doing any construction at the building 7 location?</p> <p>8 A I think minor finishing up the demoing, 9 removing of the asbestos and -- if anything.</p> <p>10 Q Okay. So there was no construction taking 11 place at this time?</p> <p>12 A Oh, it all depend if you consider it 13 construction or not.</p> <p>14 Q Well, this letter says unless construction 15 begins. That implies to me that construction had not 16 been --</p> <p>17 A Construction with permits what he means.</p> <p>18 Q Okay. Did the construction begin prior to 19 March 16, 2019?</p> <p>20 A Construction with permits?</p> <p>21 Q Whatever's meant by this letter.</p> <p>22 A No.</p> <p>23 Q Did not?</p> <p>24 A No.</p> <p>25 Q Okay. Did the entitlements expire?</p>

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<p>1 A We were able to salvage it. 2 Q And how were you able to salvage it? 3 A By pulling structural permits. 4 Q Okay. What does "salvage it" mean? What does 5 that mean now? 6 A If something was -- was wrecked and you are 7 able to recycle it or salvage it or -- before you trash 8 it, you -- 9 Q Okay. As it relates to your entitlements, 10 what is the current status? 11 A We are -- we went and pulled seismic retrofit 12 permit. And the -- by the time -- from the day that we 13 pulled the seismic retrofit permit, we have six months 14 to start construction. 15 Q And not to be technical, what does it mean by 16 "start construction"? Like, what do you have to do 17 within six months? 18 A Call for inspection. Call for the inspector 19 to come in and inspect that there we are, started 20 construction. 21 Q And you stated that the -- the permits were 22 pulled in February; is that correct? 23 A Yes. 24 Q One document that's been produced in the case 25 says -- is a permit from February 21st, 2019. Does that</p>	<p>1 Q Do you have plans to begin construction before 2 August? 3 A We have no loan. We lost the loan. 4 Q Okay. Is that the only reason you're not 5 beginning -- did not have plans to begin construction by 6 August 2019? 7 A That is the major reason. I mean, we are -- 8 I'm fascinated. I'll be honest with you. I lost the 9 loan after the whole aggravation. So yes, that is -- 10 that is the major issue. We don't have the financing. 11 Q Could you begin the construction without the 12 financing loan? 13 A I can if I want to bring -- if I have the 14 money available in my pocket to do it, find people. 15 Q And when did you lose the financing as you 16 describe it? 17 A I don't remember. Sometime at that time, the 18 bank sent us a letter stating that pulling away, and we 19 had some money with them because we gave them about half 20 a million dollar to fees. So they says we have some 21 money and send us where we should send the money to you. 22 Q So they sent you a letter? 23 A They send us -- I believe a letter or e-mail, 24 yeah. 25 Q Terminating the -- the application?</p>
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<p>1 sound -- 2 A Could be. 3 Q Okay. So does that mean from six months from 4 February 21st, 2019, you needed to begin construction 5 for the entitlements? 6 A I believe so. Yes. 7 Q So that would be -- 8 A September, I think. 9 Q August? 10 A August or September. All depend if you 11 counting February into March -- 12 Q August 21st? 13 A No. I said September 21st, if I'm not 14 mistaken. 15 Q So you said you have six months from the date 16 the permit was pulled? 17 A Six months from August -- from February 21st, 18 so it should be September 21st, if I do the number 19 correctly. 20 Q To March, April, to May, to June, July, to 21 August -- 22 A That six? 23 Q -- would be six. 24 A To August, then. When did we -- somewhere I 25 was told September.</p>	<p>1 A Cutting off the loan, yeah. 2 Q Okay. I don't believe we've seen that 3 communication. So, again, that would be another request 4 we would make. 5 A I had my lender -- my loan broker send a 6 summary. 7 Q We're going to get to that in a moment. 8 A Yeah. 9 MR. WEAVER: Let's mark 18. 10 (Exhibit 14 marked.) 11 BY MR. WEAVER: 12 Q Mr. Shomof, we're handing you an exhibit 13 marked Number 14, which is another e-mail chain bearing 14 Bates Number SK 6728 through 6731. 15 Focused specifically on the second e-mail, 16 which is February 14, 2019, at 4:14 P.M. from Steve to 17 Mark. You are not copied on the e-mail, but then Mark 18 forwards it to you as an FYI. 19 Do you see that? 20 A Yes. 21 Q Do you remember receiving this e-mail 22 forwarded by Mark? 23 A Most likely, yes. 24 Q Do you remember it, sitting here today? 25 A Not -- not 100 percent. But yes, most likely</p>

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<p>1 I've seen it, yes.</p> <p>2 Q So in this e-mail from Steve, it seems to be 3 inviting you to meet to start to discuss in greater 4 detail assertions made in a prior letter. Do you 5 remember getting that invitation from -- I'm sorry -- 6 your counsel getting that invitation?</p> <p>7 A I remember something like that, it's true. I 8 think we -- as far as I remember, we ask him to meet 9 with us to allow us to do the HVAC to complete what was 10 left off because Sears asked us to do the 11 construction -- completing the HVAC together when we do 12 the seismic.</p> <p>13 Now we are not doing the seismic, so we wanted 14 to finish up the HVAC to be able to get back our 15 \$1.4 million, whatever left of it. And he says let's 16 meet, and nothing came out of that meeting. Nothing 17 came -- that meeting never -- never came across.</p> <p>18 Q Okay. In that e-mail, Steve also states that 19 Sears has been very unhappy with the progress and 20 development to date, as you and your client know.</p> <p>21 Did you know that Sears was unhappy with the 22 progress of the development to date of this e-mail?</p> <p>23 A Not happy -- that Sears are not happy with us?</p> <p>24 Q Yes. With the progress of the work and the 25 development. Were you aware of that?</p>	<p>1 hours?</p> <p>2 A (Witness shakes head.)</p> <p>3 As far as I remember, no. Not at all.</p> <p>4 Q So you think his statement that he sent a 5 lawyer over during work hours is just not true?</p> <p>6 A I believe that that's what he believed. I 7 cleared it to him that there was -- the homeless is 8 breaking in.</p> <p>9 MR. WEAVER: Let's do -- let's do Number 23.</p> <p>10 Up to Number 15.</p> <p>11 (Exhibit 15 marked.)</p> <p>12 BY MR. WEAVER:</p> <p>13 Q Mr. Shomof, I've handed you an exhibit which 14 is marked Exhibit Number 15. It's another e-mail chain 15 bearing Bates Number SK 6904 through SK 6923. It's a 16 very long e-mail exchange. Obviously, you're welcome to 17 look at the entire chain, but I'm really going to focus 18 just on the beginning at the top here. Let me know when 19 you are ready.</p> <p>20 A I am ready.</p> <p>21 Q So looking at the second e-mail on the first 22 page, it's an e-mail dated August 29th, 2018, from 23 someone at OZK.com, which, I presume, is Ozark bank?</p> <p>24 A Bank of the Ozark [sic], yeah.</p> <p>25 Q To someone at Balboa Financial?</p>
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<p>1 A Not at all. This is something that --</p> <p>2 Q So you disagree with Steve's comment in the 3 letter?</p> <p>4 A I do disagree with Steve.</p> <p>5 Q Okay. He also says "Just last week, I need to 6 send a lawyer from my firm to stop activity during 7 working hours by your client's demolition team putting 8 our customers and employees at risk."</p> <p>9 Were you still having issues in 10 February 14th, 2019, of disrupting business at Sears 11 through your demolition crew?</p> <p>12 A Like I mentioned very earlier in this 13 deposition, homelesses continuously breaking in. And 14 the easiest thing for Steve to do is blame us. And we 15 explain Steve repeatedly homelesses are breaking in. As 16 we speak, I bet the homeless is running along the 17 building. It's 1.6 million-square-feet building with 20 18 different entrances. Every -- even though everything is 19 locked, they keep on breaking in.</p> <p>20 Q But his note specifically is about stopping 21 activity during work hours by the demolition team.</p> <p>22 A He -- he thinks that it's work hour, but it's 23 not. He making it up by thinking that it's work, our 24 employees, but none of our employees were there.</p> <p>25 Q So you have no employees there during work</p>	<p>1 A Yes.</p> <p>2 Q Okay. And who is Balboa Financial?</p> <p>3 A He's my loan broker.</p> <p>4 Q Okay. And is Bank of Ozark [sic] the bank 5 that you were discussing construction financing with?</p> <p>6 A Yes.</p> <p>7 Q Okay. The top e-mail is from April 29, 2019, 8 where Scott Duntley at Balboa forwards this long e-mail 9 chain along with a summary to you and other members of 10 your -- of your group.</p> <p>11 Do you see that?</p> <p>12 A Yes.</p> <p>13 Q Do you remember receiving this e-mail in 14 April?</p> <p>15 A Yeah, I remember something like that.</p> <p>16 Q Okay. Do you know why in April 2019, Scott 17 Duntley is forwarding this e-mail chain to you and your 18 colleagues?</p> <p>19 A I asked him to write down the point -- our 20 point of exactly what happened during the time period of 21 us dealing with Bank of the Ozark.</p> <p>22 Q Okay. So this is a summary prepared by your 23 loan broker at your request?</p> <p>24 A I asked him to please summarize of what 25 happened, yes.</p>

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<p>1 MR. WEAVER: Okay. Now, I'm going to come 2 back to -- there's the idea of the closing checklist 3 from October 4th, but before I do that, I want to also 4 mark one more document because I think it's all the 5 same. Tab 24. Exhibit 16. 6 (Exhibit 16 marked.) 7 BY MR. WEAVER: 8 Q Mr. Shomof, I've handed you an exhibit that's 9 been marked Exhibit 16. It appears to be a letter from 10 May 22nd, 2019, from Balboa Financial to you regarding 11 Bank of the Ozark loan for Sears Boyle Heights project. 12 Do you see this? 13 A Yes. 14 Q Do you recognize this letter? 15 A Yes. 16 Q Okay. Did you ask Balboa Financial to provide 17 this summary to you? 18 A Yes. 19 Q Okay. What discussions did you have with 20 Balboa Financial for the preparation of this letter? 21 A I said can you please provide me the summary 22 of detail of what exactly happened. 23 Q And on the bullet point at 7/3/2018 in the 24 middle of the letter -- 25 A Where?</p>	<p>1 A Either from an e-mail or we had a weekly 2 conference call for maybe two or three hours. So -- 3 Q So this could just be someone's recollection 4 of what was said on a conference call? 5 A Could be. Could be with a conference call. 6 Could be with an e-mail to him or conversation that he 7 had with them. I don't know. 8 Q And this seems to imply that the amendment has 9 to be for the relocation of Sears during construction. 10 And we were discussing earlier today whether or not the 11 closing condition was that Sears had to close for six 12 months or if there would be some other amendment. This, 13 would you agree, suggests that the condition was the 14 relocation of Sears; is that correct? 15 MR. KUPETZ: Objection. Objection. 16 Mischaracterizes. 17 BY MR. WEAVER: 18 Q You can answer. 19 A That is something that, like I mentioned 20 before, I mentioned to Bank of the Ozark that I'm trying 21 to negotiate with Sears to allow us to get into Sears' 22 space and complete the project within six months versus 23 doing it in portion. So they keep on asking if you have 24 that agreement with them. 25 Q So this was raised, according to this letter</p>
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<p>1 Q I'm sorry. June the 3rd, 2018 -- I'm sorry. 2 July. July the 3rd, 2018. 3 A Okay. 4 Q It says "Bank's counsel asks is there a 5 current amendment that speaks to their relocation of 6 Sears during construction" -- 7 A Okay. 8 Q (Reading:) 9 -- "or is that in process of being drafted?" 10 That was Mr. -- I actually don't know who this 11 is from. It's from the president of Balboa. I can't 12 read the signature. The author of this letter has put 13 that statement in quotes. Do you know the source of 14 that quotation? 15 A That's what we been talking most the day today 16 that we have an agreement with Sears of us entering and 17 doing the seismic. 18 Q No, I understand. I'm asking specifically the 19 author of this letter seems to be quoting something from 20 July 3rd -- 21 A That's what I'm trying to say. That's what 22 happened in July 3rd, 2018. 23 Q It says the bank's counsel asked. Is that 24 from an e-mail? From a meeting? I'm trying to 25 understand where the source of the quotation comes from.</p>	<p>1 prepared by Balboa at your request, in early July. And 2 the letter that we saw earlier today was from late 3 September where you set forth the request that Sears 4 close for six months. Is that the correct timeline? 5 A No. What was your answer -- what was your 6 question again? 7 Q That this indicates that the issue arose in 8 early July -- 9 A Okay. 10 Q -- and the letter that we discussed earlier 11 where you set forth the proposal for Sears to close for 12 six months was late September; is that correct? 13 A I sent the proposal, but I was verbally 14 negotiating with Sears, I think, even before July 3rd. 15 Q But the -- the proposal that you sent was in 16 late September; correct? 17 A Reading from our proposal, yes. 18 Q Okay. 19 A But verbally conversation repeatedly, it was 20 prior. 21 Q And the last bullet says "Approximately six 22 months after last all-hands status call, Bank OZK 23 terminated the application due to lack of activity." 24 Again, is it your testimony today that they 25 provided you some written termination?</p>

1 A I -- as far as I remember, yes. 2 (Exhibit 17 marked.) 3 BY MR. WEAVER: 4 Q Mr. Shomof, I've handed you what has been 5 marked as Exhibit 17, which is Bank OZK closing 6 checklist -- 7 A Yes. 8 Q -- last revised October 3rd, 2018. Do you 9 recognize this document? 10 A Looks very familiar, yes. I've seen it 11 before. I believe I've seen it before. 12 Q Based upon my reviews of the document, this 13 seems to be the last version of this and was attached, I 14 believe, to the one summary e-mail that we looked at 15 before. 16 A Okay. 17 Q So if you think there's a later version, let 18 me know, but my understanding is this is probably the 19 latest version of this document. 20 A Yes. 21 Q And if you will -- I should have noted for the 22 record that the Bates number here is SK 1129 through 23 SK 1140. 24 And if you turn to page 1135 -- and you'll see 25 section 8 is a tenant lease, leases, and related	Page 133	1 charting out the various closing conditions; is that 2 correct? 3 A Correct. 4 Q Okay. And was the lease amendment on 5 construction relocation the only open closing condition 6 from this list? 7 A The only closure open condition. All the rest 8 are very, very minor. Could have got done within a 9 week. 10 Q Well, if you turn the page to Number 1136, 11 you'll see section 8, which is construction. 12 A Section 8. I don't see section 8. 13 MR. KUPETZ: In -- in red. 14 THE WITNESS: Okay. Sorry. 15 BY MR. WEAVER: 16 Q And you'll see that there are construction 17 contracts. 18 A Yes. 19 Q With general contract, et cetera. 20 A Yes. 21 Q One of which says the general contract is due 22 October 1st? 23 A Yes. 24 Q Do you know if the general contract was 25 obtained by October 1st?	Page 135
1 information. 2 A Uh-huh. What -- Number C? 3 Q On Number 8. 4 A Eight, okay. 5 Q And then you see subsection C is the Sears 6 lease and agreements. 7 Do you see that? 8 A Yes. 9 Q Okay. Item Number 1 is lease amendment on 10 construction relocation. 11 A Yes. 12 Q Is that a condition that you have been 13 discussing today? 14 A Yes. 15 Q Okay. And you describe this as a closing 16 condition; is that right? 17 A Yes. 18 Q Okay. Is it your understanding that every 19 item listed on this checklist is a closing condition? 20 A Oh, you talking about closing condition -- 21 Q For the loan. 22 A -- in regards to the loan? 23 Q Yes. 24 A Most likely, yes. 25 Q Okay. So -- so this 11-page document is -- is	Page 134	1 A I had general contract, which it was Big Stuff 2 construction. Big Stuff construction have done over a 3 thousand units for me before. But they were not big 4 enough for Bank of the Ozark, so they ask us for another 5 general contractor. 6 Q Okay. 7 A And they -- I asked them if Suffix general 8 contractors are good enough for them, and they 9 recommended that Suffix are the one that -- that are 10 doing projects with Bank of the Ozark in Seattle 11 somewhere. So we were negotiating with Suffix, and we 12 finalized. We were told finalizing an agreement to do 13 Suffix would be the general contractor on the job. 14 Q Was that ever finalized? 15 A No. Finalizing mean signed contract. It was 16 not signed contract, but we were in the process of 17 getting it done. We decided not to do it. 18 Q When did you decide not to do it? 19 A When things start falling apart. 20 Q So by the time Sears filed for bankruptcy 21 October 15th, 2018, you did not have a general 22 contractor; is that correct? 23 A I did have a general contract but not signed 24 an agreement with a general contract. 25 Q Okay. So that was a closing condition that	Page 136

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<p>1 had not been met by the date of the bankruptcy; is that 2 correct?</p> <p>3 A It could have been met with one signature.</p> <p>4 Q Why wasn't it signed, then?</p> <p>5 A Because I chose not to sign. Once I sign, I 6 am bonded to it. I didn't want to sign it before I know 7 where I'm at with Sears. That's why I did not sign it.</p> <p>8 Q But you needed a general contractor to be able 9 to do the project; correct?</p> <p>10 A I needed and I have a general contractor. 11 We've been with many, many meeting with general 12 contractor. They give us the agreement. And we were 13 going through the agreement. It's about just signing 14 it. And we decided not to sign it before we know 15 exactly where we are.</p> <p>16 Q I see. 17 I don't want to go through and take their time 18 to go through this entire document. But --</p> <p>19 A I have the time if you want to take the time.</p> <p>20 Q Well, you'll notice under the checklist under 21 "Party," if "B" is indicated there, that's the borrow's 22 responsibility. Would you agree with that?</p> <p>23 A Okay.</p> <p>24 Q And would you agree that as you flip through 25 this -- this document, there's a significant number of</p>	<p>1 Q What is the current status of the Bank of 2 Ozark's loan?</p> <p>3 A As of now?</p> <p>4 Q As of today.</p> <p>5 A They called it off. I'm half a million dollar 6 in attorney's fees with them and tens of thousands of 7 dollars with appraisals and many other studies that was 8 provided to them.</p> <p>9 Q Did -- in June of 2019, so earlier this month, 10 did they offer you a new indication of interest for 11 construction financing?</p> <p>12 A June of 2000 --</p> <p>13 Q '19.</p> <p>14 A Not that I know of, no.</p> <p>15 MR. WEAVER: Let's mark 18. (Exhibit 18 marked.)</p> <p>16 BY MR. WEAVER:</p> <p>17 Q Well, let me ask you. We've marked -- for the 18 record, we've marked a document Exhibit Number 18 20 entitled "Bank of the Ozarks." Seems to be a letter to 21 you Bates numbered SK 3117 through -397.</p> <p>22 A So what is the question?</p> <p>23 Q Well, this is a letter dated June 14, 2019.</p> <p>24 Is this a letter you received from Bank of the Ozarks?</p> <p>25 A That must be typo. First of all, June 14 --</p>
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<p>1 "B" items that are not completed as of the date of this 2 draft? Would you agree with that?</p> <p>3 A Yeah. Those are very -- if you look -- if you 4 want to go through one by one, I'll go with you one by 5 one. It's very minor. I know it sounds a lot of "Bs," 6 like a lot of conditions, but that's not the case. So 7 if you -- I have the time if you have the time to go on 8 every each one of them one by one, and I have an answer 9 for you.</p> <p>10 Q Well, as much as I would enjoy going one by 11 one, my question for you is again what I asked you 12 earlier today that as of October 15th, the date of the 13 bankruptcy, filing of the bankruptcy, the Sears 14 amendment for relocation was not the only closing 15 condition you had not satisfied; correct?</p> <p>16 A Again, like I said twice before -- this again 17 the same question that you asking. The only crucial 18 issue was Sears. All the rest was very minor, could 19 have got done in two days, a week max. For example, as 20 I'm reading over here, insurance. We had all the 21 insurance lined up. We just did not start paying fees.</p> <p>22 Q And all the permits pulled?</p> <p>23 A Permits could have been pulled if I have the 24 contract to go pay for them. And I end up paying for 25 the permits myself seismic retrofit out of my own cash.</p>	<p>1 most of June. That's what I was trying -- I start 2 saying. Most of June I was in Europe. I was not here. 3 I got back. I delayed, I think, the 4 deposition because I just got back recently. But first 5 time I'm seeing that. Maybe a typo in the date.</p> <p>6 MR. KUPETZ: I think what it probably was -- 7 THE WITNESS: I don't know where it came from. 8 MR. KUPETZ: -- an automated date updating of 9 a date. You know how documents -- whether it was in 10 Word or whatever, I think it probably -- when it was 11 forwarded or printed, probably self-automated. That's 12 our guess.</p> <p>13 THE WITNESS: You guys?</p> <p>14 MR. KUPETZ: I think that was probably the 15 date where your office may have sent it to us.</p> <p>16 THE WITNESS: Could be.</p> <p>17 MR. KUPETZ: So when they forwarded -- again, 18 I'm not sure.</p> <p>19 THE WITNESS: That's the first time I've seen 20 that June 14 of 2019.</p> <p>21 BY MR. WEAVER:</p> <p>22 Q Okay. So they're not in current discussions 23 with the Bank of Ozark regarding construction financing?</p> <p>24 A No, they're not.</p> <p>25 MR. KUPETZ: Claire's pointing out on that</p>

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<p>1 document that you were just looking at, if you go to the 2 signature on page 23 of 27, it was -- has a 2018 date 3 there.</p> <p>4 MR. WEAVER: Okay. Thank you.</p> <p>5 Q Mr. Shomof, how many -- how many properties 6 are you and your groups landlords over?</p> <p>7 A How many individual properties?</p> <p>8 Q Yeah. Ballpark, if necessary. Are you a 9 landlord on 20 properties? A hundred properties? A 10 thousand properties?</p> <p>11 A Probably 25, 30.</p> <p>12 Q Do any of those involve retail tenants?</p> <p>13 A Yes.</p> <p>14 Q And in your experience as a landlord with 15 retail tenants, have you ever experienced a situation 16 where a retail tenant has closed for six months or more?</p> <p>17 A My tenants --</p> <p>18 Q Yeah.</p> <p>19 A -- or other tenants?</p> <p>20 Q Your tenants.</p> <p>21 A My tenants, if they close for six months? No. 22 And I have an explanation for it.</p> <p>23 Q Please.</p> <p>24 A I've done a very similar project at 25 609 South Grand with a seismic retrofit with retail</p>	<p>1 those employees?</p> <p>2 Q I'm asking --</p> <p>3 A They just decided to shut down?</p> <p>4 Q Let's take a step back, Mr. Shomof. Your 5 suggestion was they close for six months --</p> <p>6 A No. You asking me a very technical -- trying 7 to put me on the spot in a way of worrying about 8 employees.</p> <p>9 Q Mr. Shomof --</p> <p>10 A By Sears not allowing me to do the seismic 11 retrofit and having a thousand employees working and 12 doing the renovation, what happened to those employees 13 for heaven's sake?</p> <p>14 Q Mr. Shomof, my question is: Your proposal is 15 that Sears shut down for six months or more and 16 presumably then re-open; is that correct?</p> <p>17 A Yes.</p> <p>18 Q So what did you think was going to happen to 19 employees for that six-month time period?</p> <p>20 A Relocate them to other Sears department store 21 that are still open.</p> <p>22 Q Do you know the closest Sears locations to 23 Boyle Heights?</p> <p>24 A No, not offhand. But I've seen many Sears 25 around still open or unless they shut down.</p>
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<p>1 spaces on the ground floor. We were negotiating with 2 Carl's Juniors [sic] for them to close for six months. 3 They said, no, we cannot. We found other routes, and we 4 got it done, completed. All we need is for them to just 5 say undoable, not just put us on ice.</p> <p>6 Q But my question is: Are you familiar with any 7 of your tenants ever agreeing to close for six months? 8 Is the answer to that no?</p> <p>9 A I did not approach -- except Carl's Jr., I did 10 not approach no other ones before Grand.</p> <p>11 Q In your experience as a landlord, are you 12 familiar with retail establishments that are not your 13 tenants that have closed for six months or more?</p> <p>14 A Yes.</p> <p>15 Q Do you have an example?</p> <p>16 A Am I familiar with people that shut down for a 17 period of time? Yes. I need to think for a second. I 18 think it even happened to us. I may take it back. I 19 cannot recall immediately, but I can come back with 20 few -- a few of them at a later time.</p> <p>21 Q When asking Sears to shut down for six or more 22 months, what did you think would happen to the 23 employees?</p> <p>24 A What happened to the employees when they shut 25 down thousands of stores? Did they have concern about</p>	<p>1 Q Did it seem reasonable to you that Sears would 2 be able to shut down for six or more months and then 3 re-open with the same customer base and same sales 4 force?</p> <p>5 A Absolutely yes. And I can explain why.</p> <p>6 Q Please do.</p> <p>7 A Sears have not put a coat of paint on that 8 location for the past 25 years. Sears are not in 9 compliance with ADA on that project for many, many 10 years. I offered to do all that stuff for them. I 11 offered to renovate. I offered to replace the ceiling, 12 to replace the carpet. I offered a lot of things to 13 them in exchange for that, putting a new HVAC system. 14 So -- and the most important one is for them 15 to have a lease, a 99-year lease, with a seismic 16 retrofit building. And that will give them a bigger and 17 better -- a bigger and better value to the lease. I 18 pleaded with them in every which way I can. And they 19 just ignore us big time.</p> <p>20 Q I understand, Mr. Shomof, that you feel that 21 it would be in Sears' interest to shut down for six or 22 more months without any form of compensation. I'm 23 guessing what I'm asking, though, is from this practical 24 matter --</p> <p>25 MR. KUPETZ: I would just object in terms of</p>

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<p>1 when you say "without any form of compensation," I think 2 that's mischaracterizing what he said.</p> <p>3 BY MR. WEAVER:</p> <p>4 Q In your offer, Mr. Shomof, for Sears to shut 5 down, did you offer any financial compensation to Sears 6 for the lack of sales or other costs incurred for those 7 six-plus months?</p> <p>8 MR. KUPETZ: Objection. Vague and ambiguous.</p> <p>9 BY MR. WEAVER:</p> <p>10 Q You can answer the question.</p> <p>11 A I did not offer cash, but I offer them gain on 12 the lease, which should have been into the millions of 13 dollars.</p> <p>14 Q That gain, Mr. Shomof, they were entitled to 15 under the terms of the 2015 amendment; correct?</p> <p>16 A That gain they're entitled to of the 2015 17 amendment.</p> <p>18 Q The value you say that they will get from a 19 retrofitted building is what they bargained for in the 20 2015 amendment where you promised to retrofit the 21 building; correct?</p> <p>22 A Yes.</p> <p>23 Q So what is the additional value to Sears 24 beyond what they've already obtained from the 2015 25 amendment?</p>	<p>1 and soul into it. I want to get it happen and 2 developed. I've been through hell with the financing. 3 I've been through hell with a lot of -- getting permits. 4 It was hard. The answer is I hope that in some way, I 5 can maybe salvage it.</p> <p>6 Q So is the answer no, it's not dead?</p> <p>7 A Yes, the answer is no, it's not dead.</p> <p>8 MR. WEAVER: That's all we have. We greatly 9 appreciate your time today, Mr. Shomof. I don't know if 10 your counsel has anything.</p> <p>11 THE WITNESS: Thank you very much. 12 Do you want to give him the other stuff?</p> <p>13 MR. KUPETZ: Let's go off the record, take a 14 break.</p> <p>15 MR. WEAVER: We can go off the record. 16 (The deposition concluded at 3:15 P.M.)</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 A All they could have said is no. We want 2 5 million, 1 million, 10 million or we don't want 3 nothing. We are not closing down. We would have 4 rerouted our other option or exercised our other option.</p> <p>5 Q And you waited for six months instead of 6 effectuation your other option; correct?</p> <p>7 A I waited for four and a half months, hoping to 8 get some kind of an answer from them.</p> <p>9 Q While your construction financing lay in the 10 balance?</p> <p>11 A And I kept on asking the construction 12 financing to just hold off another week, another two 13 weeks, another month, but it end up not happening.</p> <p>14 MR. WEAVER: Take a break and check our notes.</p> <p>15 MR. KUPETZ: How much time do you want?</p> <p>16 MR. WEAVER: Well, it depends -- of the break, 17 five, ten minutes. Thank you.</p> <p>18 (Brief recess.)</p> <p>19 MR. WEAVER: Back on the record.</p> <p>20 Q Mr. Shomof, is the development plan for Boyle 21 Heights that we've been discussing today dead?</p> <p>22 A I hate to say -- I literally hate to say even 23 maybe. I'm trying -- this is something that is -- my 24 flux sheet of my projects, I've done 25 other projects. 25 This is the biggest one. This is a -- I put my heart</p>	<p>1 ACKNOWLEDGMENT</p> <p>2</p> <p>3 STATE OF _____) 4 _____ ss.: 5 COUNTY OF _____) 6</p> <p>7 I, IZEK SHOMOF, hereby 8 certify that I have read the transcript of my 9 testimony taken under oath in my deposition; 10 that the transcript is a true, complete and 11 correct record of my testimony, and that the 12 answers on the record as given by me are true 13 and correct.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18 _____ IZEK SHOMOF</p> <p>19</p> <p>20 Signed and subscribed to before 21 me, this _____ day of _____, _____. 22</p> <p>23 _____</p> <p>24 Notary Public, State of _____ 25</p>

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1 C E R T I F I C A T E

2

3 STATE OF CALIFORNIA)
4) ss
5 COUNTY OF LOS ANGELES)

6

7 I, DONNA J. RUDOLPH, a Certified Court
8 Reporter, do hereby certify:

9 That prior to being examined, the witness in
10 the foregoing proceedings was by me duly sworn to
11 testify to the truth, the whole truth, and nothing but
12 the truth;

13 That said proceedings were taken before me at
14 the time and place therein set forth and were taken down
15 by me in shorthand and thereafter transcribed into
16 typewriting under my direction and supervision;

17 I further certify that I am neither counsel
18 for, nor related to any party to said proceedings, not
19 in anywise interested in the outcome thereof.

20 In witness whereof, I have hereunto subscribed
21 my name.

22 Dated: July 1, 2019

23

24 DONNA J. RUDOLPH, RPR
25 CA CSR NO. 9652, NV CCR NO. 420

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1 ***ERRATA***

2 ELLEN GRAUER COURT REPORTING CO. LLC
3 126 East 56th Street, Fifth Floor
New York, New York 10022
212-750-6434

4
5 NAME OF CASE: IN RE: SEARS HOLDING CORPORATION
6 DATE OF DEPOSITION: JUNE 24, 2019
6 NAME OF WITNESS: IZEK SHOMOF

7 PAGE LINE FROM TO REASON
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20 _____|_____|_____|_____|
21 _____|_____|_____|_____|
22 Subscribed and sworn before me
23 this ____ day of _____, 20 ____.

24 _____
25 (Notary Public) My Commission Expires:

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